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In The

Supreme Court of the United States

RICHARD F. SCRUGGS and SCRUGGS, MILLETTE, BOZEMAN & DENT, P.A.,

Petitioners,

v.

RICHARD A. DAYNARD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Circuit violated an out-of-state defendant's rights to constitutional due process and expanded the scope of *in personam* jurisdiction well beyond the extent that this Supreme Court has ever approved by "imputing" the jurisdictional contacts of a third party to an out-of-state defendant without requiring a showing that the out-of-state defendant exerted substantial influence or control over the in-forum activities of the third party.

PARTIES TO THE PROCEEDING

Petitioners are Richard F. Scruggs ("Scruggs") and the law firm of Scruggs, Millette, Bozeman & Dent, P.A. ("Scruggs, Millette"). They are defendants in the District Court and were appellees in the Court of Appeals. Their co-defendants in the District Court are Ronald L. Motley ("Motley") and Ness, Motley, Loadholt, Richardson & Poole, P.A. ("Ness, Motley"). This petition is brought solely on behalf of Scruggs and Scruggs, Millette.

Respondent is Richard A. Daynard. He is the plaintiff in the District Court and was the appellant in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Scruggs and Scruggs, Millette (collectively "Petitioners") respectfully petition this Court to issue a Writ of Certiorari and review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the First Circuit is reported at *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., et al.*, 290 F.3d 42 (1st Cir. 2002), and is reprinted in the Appendix at App. 1-42. The decision of the United States District Court for the District of Massachusetts dismissing the Respondent's complaint is reported at *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., et al.*, 184 F.Supp.2d 55 (D. Mass. 2001), and is reprinted in the Appendix at App. 46-109.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the First Circuit issued its decision on May 10, 2002. App. 43-44. The Petitioners then filed a timely petition for rehearing *en banc*. App. 110-111. On June 17, 2002, the Court of Appeals denied the Petitioners' petition for rehearing *en banc*. App. 100-111. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment provides in pertinent part that:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Mass. Gen. Laws ch. 223A § 3 (1993) provides:

> A Court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's (a) transacting any business in this commonwealth; (b) contracting to supply services or things in this commonwealth; (c) causing tortious injury by an act or omission in this commonwealth; (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this commonwealth; (e) having an interest in, using or possessing real property in this commonwealth; (f) contracting to insure any person, property or risk located within this commonwealth at the time of contracting; (g) maintaining a domicile in this commonwealth while a party to a personal or marital relationship out of which arises a claim for divorce, alimony, property settlement, parentage of a child, child support or child custody; or the commission

of any act giving rise to such a claim; or (h) having been subject to the exercise of personal jurisdiction of a court of the commonwealth which has resulted in an order of alimony, custody, child support or property settlement, notwithstanding the subsequent departure of one of the original parties from the commonwealth, if the action involves modification of such order or orders and the moving party resides in the commonwealth, or if the action involves enforcement of such order notwithstanding the domicile of the moving party.

STATEMENT OF THE CASE

This case presents an issue with significant ramifications for civil litigation in general – *viz.*, the circumstances under which jurisdictional contacts may be "imputed" to an out-of-state defendant whose own contacts with the forum are insufficient to confer personal jurisdiction. Under the broad and virtually unprecedented "imputation" approach adopted by the First Circuit in this case, jurisdiction would be based solely on the contacts of another party where the court finds merely that a "sufficient relationship" exists between the out-of-state defendant and the in-state actor. It is submitted that the Petitioners' challenge to the First Circuit's expansive new test for imputing jurisdictional contacts differentiates this case from routine personal jurisdiction cases, for this emphatically is not a case in which the parties differ merely over the factual correctness of a particular *in personam* jurisdiction ruling. Rather, the Petitioners directly question the constitutional adequacy of the new principles concerning *in personam* jurisdiction that have been promulgated by

the First Circuit in this case. To put it bluntly, Petitioners submit that the First Circuit's newly enunciated principles concerning the imputation of contacts is inconsistent with the history of this Court's decisions in this area (decisions that date back at least into the middle of the nineteenth century), are fundamentally unfair, and represent a lamentable deprivation of Petitioners' right to due process. Because no other Circuit has imputed jurisdictional contacts on such an amorphous basis as the First Circuit's new "sufficient relationship" test, the holding of the First Circuit is particularly significant and, if unreviewed, will have a negative impact upon the due process rights of litigants throughout the country.

I. FACTUAL BACKGROUND

This case concerns a dispute with respect to an alleged oral fee-sharing arrangement that the Respondent, a law professor, contends he formed with Petitioners and their co-defendants in 1996. Respondent commenced this action seeking a share of the attorneys' fees earned by the Petitioners for their ground-breaking work on behalf of some forty-six states in the prosecution of national litigation against the tobacco industry. As a result of the substantial work of Petitioners and other law firms, the tobacco industry agreed to an historic settlement with the state plaintiffs in 1998. The present jurisdictional controversy came about as a result of the efforts of Respondent to bring suit against the Petitioners, who are all residents of Mississippi, in the Commonwealth of Massachusetts on his so-called fee-sharing claims.

A. The Respondent.

Respondent Richard A. Daynard ("Daynard"), a law professor at Northeastern University, filed a complaint in the Superior Court of the Commonwealth of Massachusetts, which was subsequently removed to the United States District Court for the District of Massachusetts. App. 48. The complaint alleges that the Petitioners and Ness, Motley co-defendants breached a purported oral contract with Daynard by failing to pay him 5% of the attorneys' fees that they were awarded in connection with their legal work on behalf of some forty-six states in litigation against the tobacco industry (hereinafter "the State Tobacco Litigation"). App. 47.

B. The Petitioners.

On April 20, 2001, Petitioners, who are all residents of the State of Mississippi, filed a motion to dismiss for lack of personal jurisdiction in the District Court. App. 12. In support of their motion, Petitioners indicated that they had insufficient contacts with the Commonwealth of Massachusetts. App. 49. Specifically, Petitioners stated that they do not practice law in Massachusetts, are not licensed to practice law in Massachusetts, maintain no offices or employees in Massachusetts, hold no bank accounts in Massachusetts, and own no real estate in Massachusetts. *Id.* Moreover, none of the discussions alleged by Daynard with respect to the formation of the so-called 5% fee-sharing agreement took place in Massachusetts. App. 51. Rather, Daynard himself contends that those alleged discussions took place in Chicago, Illinois. *Id.*; *see also* App. 9. Finally, Daynard's complaint specifically excluded a claim for fees arising from the Massachusetts tobacco litigation. App. 10. Consequently, the sole

connection that Petitioners have with the Commonwealth of Massachusetts is that Daynard chose to file suit there.

II. PROCEEDINGS BELOW

A. The District Court.

At the initial hearing on Petitioners' Motion to Dismiss, Daynard attempted to make his prima facie case of jurisdiction on the basis of Petitioners' direct contacts with the Commonwealth of Massachusetts. App. 48. After full briefing and oral argument, Chief Judge Young held that Petitioners' direct contacts with the forum were insufficient to support jurisdiction. App. 65. Acknowledging that Petitioners lacked sufficient contacts of their own with Massachusetts, Daynard then argued that the jurisdictional contacts of co-defendants Ness, Motley should be "imputed" to Petitioners under a joint venture theory. The Court granted jurisdictional discovery on this issue and ordered the parties to appear before the Court for a hearing on Daynard's "attribution" theory. App. 65.

On December 21, 2001, the District Court analyzed the issue of whether it would be appropriate to exercise jurisdiction over Petitioners by *imputing* the contacts of co-defendant Ness, Motley. App. 66. Relying on the First Circuit's oft-cited decision in *Donatelli v. National Hockey League*, 893 F.2d 459 (1990), the District Court ruled that the association between Petitioners and the Ness, Motley defendants was insufficient to impute the contacts of the Ness, Motley defendants to Petitioners. App. 82.

Specifically, Chief Judge Young held that, even if Petitioners were involved in some type of an association for the prosecution of tobacco litigation with Ness, Motley,

Daynard made no allegation that Petitioners exercised "substantial influence or control" over Ness, Motley's activities in Massachusetts as required by *Donatelli*, 893 F.2d 459 (1st Cir. 1990). The District Court noted that *Donatelli* "goes well beyond the facts of the case and provides a versatile framework by which to judge all attempts to attribute the minimum contacts of one entity to another." App. 79. Without a showing of influence or control by Petitioners over the activities of Ness, Motley in Massachusetts, Chief Judge Young held that Daynard could not satisfy the constitutional requirement of purposeful availment. Accordingly, on November 6, 2001, Chief Judge Young granted Petitioners' motion to dismiss for lack of personal jurisdiction. App. 45.

B. The Court of Appeals.

Daynard appealed to the United States Court of Appeals for the First Circuit pursuant to 28 U.S.C. § 1292. App. 1. On May 10, 2002, the Court of Appeals reversed the District Court's decision. App. 43. Despite the fact that the core issue on appeal involved the attempt to "impute" jurisdictional contacts to an out-of-state party, the First Circuit held that the test for imputing such contacts established in *Donatelli* did not apply. App. 22. As a result, the Court of Appeals created and applied a standard whereby jurisdictional contacts can be imputed even though the out-of-state party *exercises absolutely no influence or control* over the actions of the in-state actor. App. 28. Moreover, although the panel discussed various common law theories under which jurisdictional contacts might be imputed (e.g., agency, ratification, partnership and joint venture), the panel ultimately did not rest its decision to impute jurisdictional contacts on a specific

common law theory. App. 28. Indeed, the court stated on several occasions that it did not need to determine whether an enforceable agency, joint venture or other relationship existed between the Petitioners and the Ness, Motley co-defendants, because jurisdictional contacts could be attributed to the Petitioners even if the relationship fell outside of these common law doctrines. *Id.* Rather, according to the panel decision, **"the question before us is whether a sufficient relationship exists under the Due Process Clause to permit the exercise of jurisdiction, not whether a partnership, joint venture or other particular agency relationship between the two defendants exists."** *Id.* (emphasis added). In accordance with this test, the First Circuit held that the relationship between the Petitioners and the Ness, Motley defendants was "sufficient" enough to impute "some" of Ness, Motley's Massachusetts contacts to Petitioners, and it reversed the decision of Chief Judge Young.

Petitioners filed a timely petition for rehearing *en banc* pursuant to Fed. R. App. P. 35 on May 23, 2002. On June 17, 2002, the Court of Appeals for the First Circuit denied the petition for rehearing *en banc*. App. 110. Judge Selya, the author of the decision in *Donatelli v. National Hockey League*, recused himself from voting on the petition. *Id.*

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS VIOLATED THE PETITIONERS' CONSTITUTIONAL RIGHT TO DUE PROCESS BY IMPUTING THE JURISDICTIONAL CONTACTS OF A THIRD PARTY TO PETITIONERS WITHOUT REQUIRING A SHOWING THAT THE PETITIONERS SUBSTANTIALLY INFLUENCED OR CONTROLLED THE IN-FORUM ACTIVITIES OF THE THIRD PARTY.

This Petition presents an issue that this Court explicitly pretermitted in *Burger King v. Rudzewicz*, 471 U.S. 462, 480 n.22 (1985), *viz.*, the circumstances under which, without offending the requirements of constitutional due process, jurisdictional contacts may (if ever) be "imputed" to an out-of-state defendant based on the in-forum activities of another party. In addressing this important but unresolved issue, the First Circuit reversed a scholarly and comprehensive decision by Chief Judge Young of the District Court which held that, consistent with the requirements of the Due Process Clause and controlling First Circuit precedent, the jurisdictional contacts of a third party could not be imputed to Petitioners absent a showing that Petitioners exerted "substantial influence and control" over the in-forum activities of the third party. App. 82. In its place, the First Circuit adopted a test that allows jurisdictional contacts to be imputed to an out-of-state defendant based merely upon whether that defendant had a "sufficient relationship" with the in-forum third party.

In reversing Chief Judge Young, the First Circuit adopted a new and sweeping theory of personal jurisdiction that allows jurisdictional contacts to be imputed

without a showing that the defendants acted to direct or control the activities of the in-forum actor. Petitioners in this case have thus been deprived of a basic constitutional guarantee, to wit: the right not to be haled before a court in a jurisdiction in which defendants have done nothing purposefully to avail themselves of the benefits and protections of the forum's laws. The First Circuit has thus established a precedent that exceeds the outer limits of constitutional due process and that substantially erodes the constitutionally based requirement of purposeful availment in the personal jurisdiction analysis. For these reasons, this Court should now address the issue that it expressly chose not to address in *Burger King*.

A. The First Circuit's Decision Impacts Fundamental Constitutional Rights.

The right not to be brought before a court of a foreign jurisdiction with which a party has had no previous connection or contact is fundamentally a right of constitutional dimension. Fundamental fairness and due process rights underlie this right and cannot be excluded from the analysis. "[The Due Process Clause] does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). The foundation upon which the constitutional exercise of personal jurisdiction rests is the notion of voluntariness on the part of the defendant in "purposefully availing" himself or herself of the benefits and protections of the forum's laws. *Id.* at 319; *see also Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself

of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."); *Pennoyer v. Neff*, 95 U.S. 714 (1877).[1]

In *Burger King*, this Court explained that the purposeful availment requirement of personal jurisdiction "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts . . . *or of 'the unilateral activity of another party or a third person.'*" *Burger King*, 471 U.S. at 475 (emphasis added) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980); and *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)). In sketching the contours of what would constitute purposeful availment, this Court noted that jurisdiction is only proper "where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King*, 471 U.S. at 475 (emphasis in original) (citations and footnote omitted). Central to the constitutional exercise of personal jurisdiction is the voluntary and deliberate action of the out-of-state defendant in establishing contacts with the forum, such that the defendant will have "fair warning

[1] The approach of the Court of Appeals in this case simply cannot be reconciled with the long history of this Court's treatment of *in personam* jurisdiction questions in light of the Due Process Clause. (It does not need to be emphasized that the history of the understanding of our constitutional protections has always had great significance in the eyes of this Court. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53-56 (1988); *Bridges v. California*, 314 U.S. 252, 265 (1941) (Black, J.).)

that a particular activity may subject [him] to the jurisdiction of a foreign sovereign. . . . " *Id.* at 472 (*quoting Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment)). Purposeful availment therefore requires that the defendant "deliberately" engage in "significant activities within a State" such that "he manifestly has availed himself of the privilege of conducting business there." *Id.* at 475-76. It is important to emphasize that the requirement of purposeful availment is not merely procedural; rather, this Court has made clear that it is actually the "*constitutional touchstone*" by which the constitutional sufficiency of defendant's contacts with the forum must be determined. *Burger King*, 471 U.S. at 474 (emphasis added).

B. This Court Has Not Yet Addressed the Permissible Bounds of the Attribution of Jurisdictional Contacts.

This Court in *Burger King* noted that any "attribution" theory of jurisdiction is necessarily limited, but it expressly left open the question of whether, and under what circumstances, the attribution of jurisdictional contacts to an out-of-state defendant might be constitutionally permissible:

> We have previously noted that when commercial activities are "carried on in behalf of" an out-of-state party those activities may sometimes be ascribed to the party, *International Shoe Co. v. Washington*, 326 U.S. 310, 320, 66 S.Ct. 154, 160, 90 L.Ed. 95 (1945), at least where he is a "primary participan[t]" in the enterprise and has acted purposefully in directing those activities, *Calder v. Jones*, 465 U.S. 783, 790 (1984). Because MacShara's matriculation at Burger King

> University is not pivotal to the disposition of this case, we need not resolve the permissible bounds of such attribution. *Burger King*, 471 U.S. at 479 n. 22.

Although this Court in *Burger King* did not "resolve the permissible bounds of such attribution," it did intimate that attribution of jurisdictional contacts might be constitutionally permissible – at least in cases where the out-of-state defendant is a "primary participant" in the enterprise *and* "has acted *purposefully* in directing those activities." *Id.* (emphasis added). This Court's emphasis on the purposeful conduct of the out-of-state defendant is entirely consistent with the constitutional touchstone of minimum contacts analysis – that of purposeful availment. In situations where the out-of-state defendant actually directs and controls the activities of the in-forum party, it might be said that the defendant has thus acted in a manner that deliberately connects him to the forum; but in situations, such as this one, where there is no claim of such direction and control, it offends due process and the history of this Court's *in personam* jurisdiction rulings to assert that the requirement of purposeful availment has been satisfied.

C. The First Circuit Improperly Attributed Jurisdictional Contacts in Violation of the Due Process Clause of the Constitution and Abandoned Its Own Precedent.

Although the First Circuit discussed the possibility that the Massachusetts contacts of the Ness, Motley defendants might be attributed to Petitioners under some form of agency, partnership or joint venture theory, in the end the court specifically eschewed reliance upon these

common law theories in favor of a much more liberal and essentially unprecedented approach:

> Even if the defendants' relationship were to fall slightly outside the confines of these specific doctrines, *the question before us is whether a sufficient relationship exists under the Due Process Clause to permit the exercise of jurisdiction, not whether a partnership, joint venture, or other particular agency relationship between the two defendants exists. Daynard v. Ness, Motley*, App. 28 (emphasis added).
>
> * * *
>
> The basic question is *whether the relationship between the Scruggs defendants and the Motley defendants, however one labels it, is sufficient to attribute any of the Motley defendants' contacts to the Scruggs defendants* under the Massachusetts long-arm statute as cabined by the Due Process Clause of the Fourteenth Amendment. *Id.* at 20 (emphasis added).

The panel decision then went on expressly to reject any requirement that the out-of-state defendant exert influence or control over the actions of the in-state third party, finding that such deliberate conduct on the part of the out-of-state defendant was not necessary to impute jurisdictional contacts. App. 23. Having thus defined the question as merely whether a "sufficient relationship" existed between defendants to support the attribution of jurisdictional contacts, the panel adopted a test that far exceeds in scope any precedent of this Court or any Court of Appeals – and that indeed runs contrary to the First Circuit's own previous decisions.

Prior to the panel's decision, the law in the First Circuit was clear that actual control or influence over the in-state third party must be demonstrated in order to impute jurisdictional contacts to an out-of-state defendant. In a thoughtful and carefully written decision in *Donatelli v. National Hockey League*, 893 F.2d 459 (1st Cir. 1990), Circuit Judge Selya addressed the question earlier left open in *Burger King*, to wit: the extent to which jurisdictional contacts can be attributed to an out-of-state party. Citing the language of *Burger King*, Judge Selya wrote that the "constitutional touchstone" of purposeful availment must be satisfied in the process of attributing jurisdictional contacts. *Donatelli*, 893 F.2d at 469. In order to fulfill this requirement, the *Donatelli* court required that there must be a showing that the out-of-state defendant exercised substantial influence over the in-state third party:

> **Absent a showing that the association had substantial influence over the member's decision to conduct activities in the forum**, then it seems unfair to consider attributing the member's activities to the association; the "constitutional touchstone" of personal jurisdiction, after all, is whether the defendant "purposefully established 'minimum contacts' in the forum State. . . . " *Burger King*, 471 U.S. at 474, 105 S.Ct. at 2183. Unless such a showing can be made, ascribing the member's contacts to the association would be tantamount to haling the association into the forum solely as a result of attenuated third-party contacts or activities for which the association was not responsible. Personal jurisdiction cannot be hung on so fragile a hook. *Donatelli*, 893 F.2d at 469 (emphasis added).

In this case, contrary to the comprehensive and tradition-based opinion written by Judge Selya, the First Circuit erroneously held that the lack of any influence or control by the Petitioners over the Ness, Motley defendants would *not* prevent jurisdictional contacts from being attributed to Petitioners.[2] App. 20. Indeed, the First Circuit's approach to attribution dramatically erodes (and almost completely eviscerates) the requirement of purposeful availment precisely because it allows jurisdictional contacts to be imputed without a showing of purposeful conduct on the part of the out-of-state defendant.[3] Without such a showing the First Circuit simply could not, consistent with the Due Process Clause of the Constitution, impute a third party's jurisdictional contacts to Petitioners.

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[2] The *Daynard* court attempted to distinguish the *Donatelli* analysis on the basis that the *Donatelli* case was a general jurisdiction case, rather than a case based on the specific jurisdiction contacts of an in-state third party. *Donatelli*'s requirement of substantial influence or control over the activities of the in-forum third party, however, was adopted to satisfy the constitutional due process requirement of purposeful availment. *Donatelli*, 893 F.2d at 469. Manifestly, the requirement of purposeful availment must be satisfied in *both* general *and* specific jurisdictional cases. *See Burger King*, 471 U.S. at 472. There is no basis, therefore, to limit the substantial influence and control requirement as applying only to the general jurisdiction analysis.

[3] Indeed, the panel decision in this case declined to disturb Chief Judge Young's ruling that the petitioner's own contacts with Massachusetts were *insufficient*, standing alone, to satisfy the purposeful availment requirement. App. 39.

D. This Court Should Address the Constitutionality of "Imputing" Jurisdictional Contacts to an Out-of-State Defendant.

If left unreviewed, the First Circuit's amorphous "sufficient relationship" test will expand the scope of *in personam* jurisdiction far beyond what the Due Process Clause has historically been held to authorize and far beyond what this Court envisioned in *Burger King*. Not only is the First Circuit's decision impermissibly broad, but it provides no meaningful guidance as to how to determine whether a particular relationship is "sufficient" such that jurisdictional contacts may be imputed to another party. In fact, the panel decision stated that traditional common law theories *do not* define the bounds of its new test, but it has otherwise failed to explain its scope. App. 28. Rather, the court has only said that the relationship "however one defines it" must merely be "sufficient." App. 20.

In the context of personal jurisdiction, it is critically important that litigants be put on notice as to what conduct will result in sufficient contact with the forum to confer *in personam* jurisdiction. As this Court stated in *Burger King*:

> By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," *Shaffer v. Heitner*, 433 U.S. 186, 218, 97 S.Ct. 2569, 2587, 53 L.Ed.2d 683 (1977) (Stevens, J., concurring in judgment), the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v.*

Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980).

> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984), and the litigation results from alleged injuries that "arise out of or relate to" those activities. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984). *Burger King*, 471 U.S. at 472-73.

This Court's intimation in *Burger King* (echoed in the First Circuit's 1990 decision in *Donatelli*) that direction and control of the activities of the in-forum actor are needed before jurisdictional contacts may be imputed is a standard that confers some notice to out-of-state defendants that their actions in controlling in-state third parties might lead to personal jurisdiction over them in another state. By contrast, the test established by the Court of Appeals in this case, which asks only whether there is a "sufficient relationship" with an in-state actor (especially where that relationship cannot necessarily be characterized as a formal legal relationship) can hardly be considered the type of standard that puts parties on fair notice of the likelihood that they will be subject to jurisdiction in a foreign forum.[4]

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[4] Nor did the First Circuit find it necessary to identify precisely which contacts of the third party should be imputed to Petitioners, stating only that "*some* of these contacts may be imputed." App. 20. The

(Continued on following page)

One can readily imagine countless business and other "relationships" that might arise with third parties in distant forums. In this case, a cooperative effort between attorneys in different states to bring litigation against the tobacco industry was found to meet the court's "sufficient relationship" test, and thus the in-state contacts of one third party attorney were imputed to another. App. 28, 41. This result would be reached, according to the court, even if the parties' relationship did not satisfy the requirements of a common law agency, partnership or joint venture. App. 28. The net effect of this unprecedented jurisdictional expansion is that businesses and individuals can no longer adequately predict what types of "relationships" with out-of-state third parties might subject them to long-arm jurisdiction. The term "sufficient" is alarmingly standard-less and subjective, and its meaning is very much in the eye of the beholder. As this Court has made clear, due process requires much more in terms of advance notice to litigants when personal jurisdiction in a distant forum is at issue. Petitioners, therefore, respectfully ask this Court to issue its writ of certiorari to review this matter and restore predictability to those situations where a plaintiff seeks the "attribution" of the in-forum contacts of a third party.

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court's failure to identify which contacts were being imputed to Petitioners only serves to magnify the amorphous nature of the jurisdictional test adopted by the First Circuit in this case.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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290 F.3d 42

United States Court of Appeals,
First Circuit.

Richard A. DAYNARD, Plaintiff, Appellant,

v.

NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE, P.A.; Ronald L. Motley, Defendants, Scruggs, Millette, Bozeman & Dent P.A.; Richard F. Scruggs, Defendants, Appellees.

No. 01-2595.

Heard March 7, 2002.
Decided May 10, 2002.
Rehearing and Suggestion for Rehearing
En Banc Denied June 17, 2002.

Edward J. Barshak with whom Darrel C. Waugh and Sugarman, Rogers, Barshak & Cohen, P.C. were on brief for appellant.

Stephen M. Prignano with whom Mark A. Pogue and Edwards & Angell, LLP were on brief for appellees.

Before LYNCH, Circuit Judge, CAMPBELL and BOWNES, Senior Circuit Judges.

LYNCH, Circuit Judge.

The issue on appeal is whether a federal district court sitting in Massachusetts has specific personal jurisdiction over a suit brought by Richard A. Daynard, a Massachusetts law professor, for fees in the tobacco litigation, against the Mississippi law firm of Scruggs, Millette, Bozeman & Dent, and Richard Scruggs, a senior partner ("Scruggs defendants"). At the heart of Daynard's claim is the argument that the court may reach the Scruggs

defendants based in large part on contacts imputed from the South Carolina law firm of Ness, Motley, Loadholt, Richardson & Poole, and Ronald Motley ("Motley defendants"), all of whom purportedly acted on behalf of both firms in engaging Daynard to work on litigation against the tobacco industry. We conclude, contrary to the district court, that the Scruggs defendants are subject to specific personal jurisdiction based on their contacts with Massachusetts, particularly those contacts properly attributed to them from the Motley defendants, who are also defendants in this litigation.

Daynard is a law professor at Northeastern University specializing in litigation against the tobacco industry. He sued the Motley and Scruggs defendants, claiming that, pursuant to an oral agreement, he is entitled to a portion of the fees that these firms have received or will receive from their successful tobacco litigation.

The Motley defendants, based on their Massachusetts contacts, concede personal jurisdiction, but, central to this case, the Scruggs defendants do not. Daynard does not challenge the district court's conclusion that the Scruggs defendants' own direct contacts with Massachusetts are, by themselves, insufficient to permit personal jurisdiction. Instead, he challenges the district court's ruling that personal jurisdiction does not exist based on the imputation of some of the Motley defendants' contacts, which were purportedly made on behalf of both law firms, to the Scruggs defendants. The district court reasoned that the Motley defendants were not the Scruggs defendants' agents, and, even if they were, the Scruggs defendants did not exert "substantial influence" over the Motley defendants' in-forum activities. The district court reasoned that it could not, consistent with the Due Process Clause of the

Fourteenth Amendment, attribute the Motley defendants' contacts to the Scruggs defendants for purposes of personal jurisdiction.

Daynard appeals this decision arguing that the district court erred by relying on a general jurisdiction case, *Donatelli v. National Hockey League,* 893 F.2d 459 (1st Cir. 1990), to derive the "substantial influence" requirement. Daynard argues that he need not show, for specific jurisdiction purposes, that the Scruggs defendants exerted substantial influence over the Motley defendants' in-forum activities in order to impute the Motley defendants' contacts to the Scruggs defendants. Daynard asserts that the defendants were engaged in a tobacco litigation joint venture and that, on this basis, attribution is proper.

We conclude that *Donatelli*'s substantial influence test is not controlling in this case, where Daynard alleges that the defendants were in a joint venture, or at least held themselves out to be in a type of agency relationship. We need not determine whether the defendants were actually engaged in a joint venture between themselves, however. The facts, as asserted by Daynard and construed in the light of whether he has made a prima facie jurisdictional showing, suffice to show a relationship between the two defendants sufficient to impute some of the Motley defendants' contacts to the Scruggs defendants. These same facts show that the Scruggs defendants held themselves out to be in some form of an agency relationship with the Motley defendants and, by accepting and encouraging Daynard's services, and agreeing to compensate him on the basis of a share of the fees, ratified the Motley defendants' in-forum activities giving rise to this lawsuit.

Traditional common law concepts, embodied in the law of Massachusetts, Mississippi, and South Carolina, confirm the fundamental fairness of requiring the Scruggs defendants to answer in Massachusetts. We conclude that the Scruggs defendants' contacts with Massachusetts, particularly those contacts of the Motley defendants properly attributed to the Scruggs defendants, suffice to permit personal jurisdiction over the Scruggs defendants consistent with the Massachusetts long-arm statute and the Fourteenth Amendment of the Constitution.

I.

In this case there are many disputed, and as of yet unresolved, facts. We do not resolve these disputed facts because we "must accept the plaintiff's (properly documented) evidentiary proffers as true for the purpose of determining the adequacy of the prima facie jurisdictional showing." *Foster-Miller, Inc. v. Babcock & Wilcox Canada,* 46 F.3d 138, 145 (1st Cir. 1995). We use Daynard's version of the facts (although we provide a brief description of the defendants' competing version), drawn from his complaint, both sides' subsequent affidavits, and the products of jurisdictional discovery, including Daynard's deposition of Scruggs.

A. Daynard's Allegations

Daynard is a resident and citizen of the Commonwealth of Massachusetts. He is, and has been for over thirty years, a law professor at Northeastern University School of Law, located in Massachusetts. For much of that time, he has focused his professional and academic efforts on defeating the tobacco industry in court. Daynard is

Chair of the Tobacco Product Liability Project, President of the Tobacco Control Resources Center, and a frequent advocate for, and consultant to, those opposing the tobacco industry.

For many years there was a consensus that the potential for recovery against the tobacco industry was negligible. Indeed, the tobacco industry, until 1997, boasted that it had never paid a cent to a tort plaintiff. As of 2002, the situation is drastically different. Lawyers have sued the tobacco companies on behalf of many states and recovered astronomical sums for those states, with consequently large fees for themselves. During the past several years, almost every state has sued the tobacco industry, seeking, among other things, reimbursement for the medical costs incurred as a result of smoking- related health harms. The defendant law firms in this case have been responsible for instituting, litigating, and settling litigation against the tobacco industry on behalf of forty-six different states. This settlement was accomplished, in part, in what is known as the Master Settlement Agreement. *See* National Association of Attorneys General, Master Settlement Agreement, *at* http:// www.naag.org/tobac/cigmsa.rtf (Nov. 23, 1998); *Greenless v. Almond,* 277 F.3d 601, 603 (1st Cir. 2002) (describing the tobacco litigation and settlement). Daynard says this settlement will result in a distribution of billions of dollars to the two firms.

Daynard says that his efforts were central to many of these titanic recoveries. He quotes reputable authorities stating that he is the "recognized leader" in tobacco litigation on behalf of the public health and the "foremost authority" on, and "driving force" behind, anti-tobacco legal theory and strategy. In fact, Daynard quotes one authority

stating that without Daynard's tobacco work, the state-initiated tobacco litigation would not even exist.

The parties agree that Charles Patrick, then a partner at Ness Motley, came to Boston, Massachusetts in the fall of 1993 to meet with Daynard. Daynard says that, at the time Patrick traveled to Boston to retain his services, Ness Motley and Scruggs Millette were engaged in a tobacco litigation joint venture. Indeed, throughout his dealings with Ness Motley and Scruggs Millette, Daynard understood the two firms to be in a joint venture that at first encompassed the Mississippi tobacco litigation and then broadened to include tobacco litigation nationwide. Daynard insists that Patrick was acting on behalf of both firms and that Patrick retained him to advance the objectives of the firms' joint venture.

Shortly after this initial meeting in Boston, Daynard traveled to Ness Motley's South Carolina offices, where he met with members of the firm, including Ronald Motley. At these meetings, Daynard identified and explained legal theories for recovery on behalf of state governments. After these meetings, Daynard continued to communicate regularly, by phone and fax, with members of Ness Motley, providing them advice on similar matters.

As a result of Ness Motley's retention of him, purportedly on behalf of both firms, Daynard also began "communicat[ing] regularly" with the Mississippi law firm Scruggs Millette and providing the firm with "advice and assistance." Beginning in the fall of 1993, members of both firms came to Boston to meet with and receive advice from

Daynard, in furtherance of his engagement by them.[1] According to his affidavit, Daynard "had many conversations, meetings and written communications in Boston with members of the defendant firms, in which [he] provided advice and undertook specific projects for their use in the tobacco litigation."

Daynard asserts that his legal theories, strategies, evidence, and arguments "subsequently formed a central component" of the firms' litigation brought on behalf of several states against the tobacco industry. In addition, Daynard introduced Ness Motley firm members to experienced tobacco litigators and to pleading and discovery files from other tobacco cases.

Initially, Ness Motley compensated Daynard based on hourly fees for his services rendered. As Daynard's relationship with the two firms progressed, he had "several conversations" with "both Mr. Motley and Mr. Scruggs in which they stated that they would appropriately compensate [Daynard] . . . and that the final form of compensation would be" in the form of a share of the fees the firms obtained from handling the states' tobacco litigation. Ronald Motley advised Daynard that he would be compensated for his assistance as a member of the Ness Motley "team." After this communication, Daynard says that he received no further compensation from Ness Motley. As to payment by Scruggs Millette, the parties agree that Scruggs Millette never compensated Daynard.

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[1] Scruggs denies that he participated in any such meeting in Boston for these purposes.

When the state tobacco litigation commenced, Daynard continued to work with both firms, educating their attorneys on the relevant issues, counseling them based on his experience in other tobacco litigation, providing them with relevant documents and information, and introducing them to potential witnesses and contacts. He developed litigation strategies and worked on pleadings and other documents for the firms. Many of these services were performed in Boston. *See Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 188 F.Supp.2d 115, 118 (D.Mass. 2002) (stating that "Daynard performed his research and writing, met with Ness Motley partners, and allegedly formed a compensation contract in Massachusetts"); *id.* at 119. Daynard also spoke at conferences of state governmental officials where he arranged for Ness Motley and Scruggs Millette to participate, thereby advancing their ongoing litigation and providing them with legitimacy in the eyes of potential state clients.

Ness Motley recognized and encouraged Daynard's efforts by assigning him specific projects, by requesting his information and assistance, by transporting him to selected meetings and proceedings, and by accepting his work product. At some point in 1996, when Daynard became concerned that some Ness Motley attorneys were trying to minimize his role in the litigation, Mr. Motley assured Daynard that this was not the case.

In July of 1996, when Daynard reported to Ness Motley on the time he had expended to complete a research project that Ness Motley had requested, the firm, consistent with its own and the Scruggs defendants' past assurances, informed Daynard that it would compensate him for his work by paying him a share of the fees generated if the litigation was successful, an arrangement to

which Daynard agreed. As a result of this promise, Daynard ceased submitting descriptions of his hourly work and requests for payment to Ness Motley.

Daynard says that, at a meeting in late August of 1996, Scruggs Millette and Ness Motley "confirmed" their agreement to compensate him in the form of a share of the fees. On August 25 through August 27, 1996, Daynard, Motley, and Scruggs were in Chicago, Illinois, participating in meetings related to the state tobacco litigation. Scruggs and Motley scheduled a meeting with Daynard during that period to discuss Daynard's specific share of any fee award. Although Motley was ultimately not able to attend the meeting, Daynard met with Scruggs. Daynard says he asked Scruggs "whether he was speaking for both himself and Mr. Motley" and Scruggs stated that he was, that Daynard could rely on this, and that he was acting with at least "apparent authority" for Motley. Scruggs promised Daynard 5% of any fees ultimately recovered, in any state tobacco litigation in which any of the defendants were counsel, as compensation for Daynard's past and continuing assistance. Daynard says he accepted the 5% agreement and that he and Scruggs shook hands on it. Based on the conduct of the Scruggs and Motley defendants during the course of the tobacco litigation, Daynard says that he reasonably believed Scruggs to be acting with apparent authority for both firms.

Relying on this 5% figure, and "ongoing assurances and representations," Daynard continued to work for the two firms. For example, Scruggs requested that Daynard be available during the trial in the Mississippi litigation and agreed to compensate Daynard for the cost of paying a substitute teacher to cover his Northeastern University teaching obligations. Daynard agreed by committing $15,000

of his own personal funds to buy himself out of his teaching obligations so that he could be present full-time during the trial.

Almost a year after the alleged handshake on the 5% compensation figure, and after the Mississippi state litigation had reached a tentative settlement, Daynard wrote a letter to Scruggs confirming the fee arrangement and identifying certain expenses that Daynard had incurred associated with the Mississippi litigation. Scruggs never responded. A few months later, Daynard wrote another letter, this time to both Scruggs and Motley, referring to the 5% fee arrangement. At this point, both firms were expecting to reap significant attorney's fees from the Mississippi settlement and also from the Florida settlement. Joseph Rice of Ness Motley and Richard Scruggs both responded to this second letter and both disavowed the 5% fee arrangement. Neither firm has paid Daynard any of the legal fees it has received to date. Daynard alleges that the firms based their refusal to pay him the 5% on his failure to support certain national tobacco liability legislation, a requirement he says the defendants never mentioned in any previous communication.

B. State Court Proceedings, Federal District Court Proceedings, and the Defendants' Side of the Story

On December 27, 2000, Daynard sued the Motley defendants and the Scruggs defendants in the Superior Court for Suffolk County, Massachusetts, seeking, among other things, compensation in the form of what Daynard says is his rightful share of fees generated from settlements with several states, not including Massachusetts.

Daynard claims that Ness Motley and Scruggs Millette have already received millions and will receive over two billion dollars of the fees generated from the settlement, 5% of which he claims is rightfully his. With the consent of the Motley defendants, the Scruggs defendants removed the case to federal district court on January 18, 2001. *See* 28 U.S.C. § 1441 (1994).

In their answer, the Motley defendants conceded the Massachusetts court's personal jurisdiction, but told a story on the merits very different from Daynard's. The Motley defendants admit that, in 1993, Patrick of Ness Motley met Daynard in Massachusetts, and that the firm continued to meet with and communicate with Daynard. Furthermore, they agree that Daynard provided them with documents related to the tobacco litigation, identified some potential witnesses, and did some general work on the state tobacco litigation. The Motley defendants admit that the firm made specific requests of Daynard and provided him with transportation to certain meetings and proceedings. They say that they paid Daynard for this work.

But the Motley defendants downplay Daynard's expertise, say that his assistance was neither invaluable nor substantial, and claim that his theories never formed a central component of their tobacco litigation. Furthermore, they deny that either they or Scruggs ever met with Daynard in Chicago and agreed upon the 5% figure. They deny that any agreement as alleged by Daynard existed. The Motley defendants' position is that they have already paid Daynard any money they ever owed him.

On May 30, 2001, the Motley defendants moved for summary judgment. The district court denied this motion

in part on September 13, 2001, and issued its conclusions in a written memorandum on December 3, 2001. *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 178 F.Supp.2d 9 (D.Mass. 2001). The district court addressed those issues reserved in the September 13 hearing and in the December 3 memorandum in a second memorandum and order, in which it denied the Motley defendants' motion for summary judgment. *Daynard,* 188 F.Supp.2d 115.

The Scruggs defendants pursued a different legal strategy. On April 20, 2001, they moved to dismiss Daynard's complaint for lack of personal jurisdiction or for failure to state a claim, and moved in the alternative for summary judgement. *See* Fed. R. Civ. P. 12(b)(2), 12(b)(6), and 56. Scruggs stated that he never agreed to share any fees with Daynard and that

> [i]t has always been my understanding that Professor Daynard acted as a volunteer in all of his endeavors with respect to the litigation, or was otherwise compensated by Ness Motley as a consultant on a limited basis, and that his activities were designed primarily to promote his own agenda with respect to tobacco control.

As to personal jurisdiction, Scruggs states that neither he nor his firm has ever had any offices, real estate, bank accounts, or other property in Massachusetts. Furthermore, none of the Scruggs defendants has ever practiced law in Massachusetts. Daynard does not deny this. In addition, Scruggs says that he has never traveled to Massachusetts in connection with any fee sharing arrangement with Daynard or in connection with any of Daynard's work under the alleged arrangement. He denies that he or his firm had any role in contacting or retaining

Daynard in Massachusetts. He further states that the Scruggs defendants did not request, or even have knowledge of, the Motley defendants' meetings with Daynard. Scruggs also denies that the Scruggs defendants or the Mississippi joint venture, to the extent that it existed, ever gave the Motley defendants any directions with respect to Daynard.

Although Scruggs concedes that "Daynard did at times consult with me concerning the tobacco litigation in general," he says that "these instances were extremely infrequent and were not requested or solicited by me" and that the "'assistance' . . . consisted of nothing more than information already made available to the general public."

With respect to any relationship between Scruggs Millette and Ness Motley, Scruggs stated, in a second affidavit, that Scruggs Millette was part of a written joint venture agreement in the Mississippi litigation, but that Ness Motley was not a party to that agreement. He says that "[p]rior to April of 1999, there was simply no arrangement [between Scruggs Millette and Ness Motley] with respect to the sharing of attorney's fees in the nationwide tobacco litigation." Scruggs also noted that there was no agreement that "either Scruggs Millette or Ness Motley could exert control over tobacco litigation in states where those firms were not counsel of record."

The district court, after one hearing on May 31, 2001, and after granting Daynard limited jurisdictional discovery on the issue of the relationship between the defendants from 1992 to 1998, held another hearing on September 13, 2001, in which it dismissed Daynard's complaint against the Scruggs defendants for lack of personal jurisdiction. At that September 13 hearing, the

district court stated what it labeled the "bottom line of [its] reasoning" for finding that it lacked personal jurisdiction over the Scruggs defendants:

> [W]hile the facts are sufficient to show a joint venture with respect to the Mississippi litigation, as the First Circuit has defined the term substantial influence in the Donatelli versus National Hockey League case, there is insufficient evidence in this case that the Mississippi law firm or Mr. Scruggs exercised a substantial influence over the Ness firm such as would subject Scruggs or the Mississippi firm to personal jurisdiction in Massachusetts.

Soon after that, the court entered final judgment in favor of the Scruggs defendants, thus permitting an immediate appeal to this court.

The district court supported its September 13 conclusion in a December 21, 2001, memorandum. *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 184 F.Supp.2d 55 (D.Mass. 2001). In that memorandum, the district court addressed two theories on which Daynard might show personal jurisdiction over the Scruggs defendants. *Id.* at 60-76. First, the district court concluded that it did not have personal jurisdiction over the Scruggs defendants based on their own direct contacts with Massachusetts. *Id.* at 68. Second, the district court concluded that it lacked jurisdiction over the Scruggs defendants based on contacts imputed from the Motley defendants. *Id.* at 76. The district court reasoned that the Scruggs defendants "likely were not in a joint venture" with the Motley

defendants,[2] that the Motley defendants did not act as the Scruggs defendants' agent,[3] and that the "substantial influence" requirement articulated in *Donatelli,* 893 F.2d at 469, 472, precluded jurisdiction under the Due Process Clause, U.S. Const. amend. XIV. *Daynard,* 184 F.Supp.2d at 74-76. Daynard appeals the district court's holding that it lacks personal jurisdiction under an imputed or attributed contacts theory.[4]

II.

A. Burden of Proof and Standard of Review

To hear a case, a court must have personal jurisdiction over the parties, "that is, the power to require the parties to obey its decrees." *United States v. Swiss Am. Bank, Ltd.,* 191 F.3d 30, 35 (1st Cir. 1999). The plaintiff bears the

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[2] This conclusion is in some tension with the district court's earlier explanation, at the September 13 hearing, that "the facts are sufficient to show a joint venture with respect to the Mississippi litigation."

[3] Earlier in its opinion, however, the district court noted that "the South Carolina defendants arguably acted as the Mississippi defendants' emissary," *Daynard,* 184 F.Supp.2d at 66, an observation seemingly inconsistent with its conclusion that no agency relationship existed.

[4] Daynard focuses on the district court's attributed contacts holding rather than on the district court's conclusion that the Scruggs defendants' direct contacts are insufficient. The Scruggs defendants emphasize this, noting that Daynard has not argued that their direct contacts alone are sufficient to permit personal jurisdiction. We agree that Daynard does not advance this argument, but note that many of those facts, insufficient to establish jurisdiction based on the Scruggs defendants' direct contacts, are, of course, relevant to the imputed contacts analysis as well. One cannot make a sensible inquiry into whether contacts imputed to the Scruggs defendants support personal jurisdiction without viewing those same contacts in the context of all of the other alleged facts of the case.

burden of proving the court's personal jurisdiction over the defendant. *Foster-Miller,* 46 F.3d at 145; *Boit v. Gar-Tec Prods., Inc.,* 967 F.2d 671, 674-75 (1st Cir. 1992). The district court, faced with a motion to dismiss for lack of personal jurisdiction, Fed. R. Civ. P. 12(b)(2), may choose from among several methods for determining whether the plaintiff has met this burden. *Foster-Miller,* 46 F.3d at 145; *Boit,* 967 F.2d at 674-75. "The most conventional of these methods," known as the "prima facie" method, *Foster-Miller,* 46 F.3d at 145, "permits the district court 'to consider only whether the plaintiff has proffered evidence that, if credited, is enough to support findings of all facts essential to personal jurisdiction,'" *id.* (quoting *Boit,* 967 F.2d at 675).[5]

The district court applied the prima facie method. *Daynard,* 184 F.Supp.2d at 61. We review the district court's choice of method de novo. *Foster-Miller,* 46 F.3d at 147. The parties do not object to the district court's choice of the prima facie method. Daynard states in his brief that the district court employed the prima facie approach and the Scruggs defendants agree, making no attempt to challenge the applicability of this approach. Therefore, the Scruggs defendants have waived any objection to the application of the prima facie method. *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.,* 284 F.3d 302, 309 (1st Cir. 2002); *Ortiz v. Gaston County Dyeing Mach. Co.,* 277

[5] For a discussion of other potential methods of analysis, see *Foster-Miller,* 46 F.3d at 145-46 (describing "prima facie," "preponderance-of-the-evidence," and "likelihood" standards).

F.3d 594, 598 (1st Cir. 2002). Under these circumstances, we accept the prima facie method.[6]

Accordingly, Daynard has the burden of making a prima facie showing of personal jurisdiction over the Scruggs defendants. We "must accept the plaintiff's (properly documented) evidentiary proffers as true for the purpose of determining the adequacy of the prima facie jurisdictional showing." *Foster-Miller,* 46 F.3d at 145. We take these facts "as true (whether or not disputed) and construe them in the light most congenial to the plaintiff's jurisdictional claim." *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n,* 142 F.3d 26, 34 (1st Cir. 1998); *see also Sawtelle v. Farrell,* 70 F.3d 1381, 1385-86 (1st Cir. 1995). "We then add to the mix facts put forward by the defendants, to the extent that they are uncontradicted." *Mass. Sch. of Law,* 142 F.3d at 34. We review the district court's application of the prima facie standard de novo. *Foster-Miller,* 46 F.3d at 147.

B. Background Law

"In determining whether a non-resident defendant is subject to its jurisdiction, a federal court exercising diversity jurisdiction 'is the functional equivalent of a state court sitting in the forum state.' " *Sawtelle,* 70 F.3d at 1387 (quoting *Ticketmaster-New York, Inc. v. Alioto,* 26 F.3d 201, 204 (1st Cir. 1994)). "A district court may exercise authority over

[6] When "the assertion of jurisdiction is bound up with the claim on the merits," but there exists "the possibility of permitting a dubious case to proceed beyond the pleading stage, and even to trial, though the court eventually will be found to lack jurisdiction," we have noted that the "likelihood" standard may be appropriate. *Foster-Miller,* 46 F.3d at 146; *see also Boit,* 967 F.2d at 677-78.

a defendant by virtue of either general or specific [personal] jurisdiction." *Mass. Sch. of Law,* 142 F.3d at 34. General jurisdiction exists when the defendant has engaged in "continuous and systematic activity" in the forum, even if the activity is unrelated to the suit. *United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp.,* 960 F.2d 1080, 1088 (1st Cir. 1992). This is not such a case and no party suggests that it is. "In the absence of general jurisdiction, a court's power depends upon the existence of specific jurisdiction." *Mass. Sch. of Law,* 142 F.3d at 34.

To establish personal jurisdiction, Daynard must show that the Massachusetts long-arm statute grants jurisdiction and, if it does, that the exercise of jurisdiction under the statute is consistent with the constitution. *Foster-Miller,* 46 F.3d at 144.

Daynard's complaint pleads that personal jurisdiction exists under subsections (a), (c), and (d) of the Massachusetts long-arm statute. Mass. Gen. Laws ch. 223A, § 3 (2000).[7] The relevant provision is § 3(a). The question under

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[7] The statute states, in relevant part:

> A Court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's
>
> (a) transacting any business in this commonwealth; . . .
>
> (c) causing tortious injury by an act or omission in this commonwealth; [or]
>
> (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue . . . , in this commonwealth. . . .

Mass. Gen. Laws ch. 223A, § 3(a), (c)-(d).

this subsection is whether the Scruggs defendants "act[ed] directly or by an agent, as to a cause of action . . . arising from the [defendants'] . . . transacting any business in" Massachusetts. *Id.* § 3(a). We may sidestep the statutory inquiry and proceed directly to the constitutional analysis, however, because the Supreme Judicial Court of Massachusetts has interpreted the state's long-arm statute "as an assertion of jurisdiction over the person to the limits allowed by the Constitution of the United States." *"Automatic" Sprinkler Corp. of Am. v. Seneca Foods Corp.*, 361 Mass. 441, 280 N.E.2d 423, 424 (Mass. 1972); *accord Tatro v. Manor Care, Inc.*, 416 Mass. 763, 625 N.E.2d 549, 553 (Mass. 1994); *see also Sawtelle,* 70 F.3d at 1388 ("[W]hen a state's long-arm statute is coextensive with the outer limits of due process, the court's attention properly turns to the . . . constitutional standards.").

"The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 471-72, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (quoting *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 319, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). "[D]ue process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe,* 326 U.S. at 316, 66 S.Ct. 154 (quoting *Milliken v. Meyer,* 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)); *see also Noonan v. Winston Co.,* 135 F.3d 85, 90 (1st Cir. 1998). In a contract case, we evaluate the parties' "prior negotiations and contemplated future consequences,

along with the terms of the contract and the parties' actual course of dealing" to determine whether the defendants purposefully established minimum contacts. *Burger King,* 471 U.S. at 479, 105 S.Ct. 2174.

The more difficult question in this case is whether any of the Motley defendants' contacts may be imputed to the Scruggs defendants for purposes of establishing "minimum contacts." We conclude that some of these contacts may be imputed. The next question is whether the sum of any imputed and direct contacts permits the court to exercise personal jurisdiction over the Scruggs defendants consistent with the Constitution. We conclude that these contacts suffice under Supreme Court law, *e.g., Burger King,* 471 U.S. at 471-87, 105 S.Ct. 2174; *Int'l Shoe,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, and the law of this circuit, *e.g., Noonan,* 135 F.3d at 90; *Foster-Miller,* 46 F.3d at 144.

C. Imputed Contacts

Daynard alleges that the relationship between the Motley defendants and the Scruggs defendants is such that some of the Motley defendants' contacts with Massachusetts should be imputed to the Scruggs defendants. As the district court recognized, whether the defendants were in all respects joint venturers is not alone dispositive, *Daynard,* 184 F.Supp.2d at 74, although the parties focus much of their energies on disputing this particular issue. The basic question is whether the relationship between the Scruggs defendants and the Motley defendants, however one labels it, is sufficient to attribute any of the Motley defendants' contacts to the Scruggs defendants for the purpose of reaching the Scruggs defendants under the Massachusetts long-arm statute as cabined by the Due Process

Clause of the Fourteenth Amendment. We conclude that the relationship was sufficient for that purpose. Daynard has put forth evidence that, if credited and accepted as true, is enough to support personal jurisdiction over the Scruggs defendants.

Daynard alleges that the Motley defendants and the Scruggs defendants were part of a formal, written joint venture between themselves. He also says that he believed the parties to be joint venturers because they "consistently purported to be" in such a relationship. Daynard argues that at the time Charles Patrick of Ness Motley came to Massachusetts to retain him, Ness Motley and Scruggs Millette were engaged in a form of tobacco litigation joint venture. Daynard says that Patrick was acting for both firms when Patrick retained him and that Patrick retained him to advance the objectives of the joint venture. Throughout his dealings with Ness Motley and Scruggs Millette, he understood the two firms to be in a joint venture that at first encompassed the Mississippi tobacco litigation and then broadened to include tobacco litigation nationwide.

1. Applicability of *Donatelli*'s "substantial influence" test.

First, there is the threshold question of whether the district court properly applied *Donatelli,* 893 F.2d 459, as the governing test. The parties devote the majority of their attention to this issue, but it is not dispositive of the personal jurisdiction question. The district court concluded that even if the Motley defendants acted as the Scruggs defendants' agents, "there was no substantial influence as required by Due Process." *Daynard,* 184 F.Supp.2d at 76.

The district court derived this "substantial influence" requirement from *Donatelli,* 893 F.2d at 469, a general jurisdiction case. The district court was in error. It read *Donatelli* as applying an exclusive test and as applying in the present, very different context. This over-reads *Donatelli.*

The question before us is whether Daynard must meet the substantial influence test in order to comply with jurisdictional Due Process requirements. Although *Donatelli* aids our inquiry, we conclude that its substantial influence test is not the exclusive test for attribution of conduct. It does not control the matter before us here, where the questions are whether the Scruggs defendants were in an actual or apparent agency relationship, or at least held themselves out to be in a joint venture or other agency relationship with the Motley defendants, and whether the Scruggs defendants ratified the Motley defendants' conduct.

In *Donatelli,* this court held that

> an unincorporated association which does not itself conduct significant activities in, or enjoy affiliating circumstances with, a state cannot be subject to the general personal jurisdiction of the state's courts on the basis of a member's contacts within the state unless the member carries on the in-forum activities under the association's substantial influence.

Id. at 472. Donatelli sued the National Hockey League ("NHL") in Rhode Island, challenging the NHL's draft and its failure to declare him a free agent. Jurisdiction in Rhode Island over the NHL was premised on the fact that a member team of the NHL had contacts with Rhode

Island. His suit was unrelated to either the NHL's contacts with Rhode Island or its member's contacts with Rhode Island. *Id.* at 462. The *Donatelli* court rejected the theory that the NHL could be subject to general personal jurisdiction in Rhode Island simply because one of its members was subject to general jurisdiction in that state. *Id.* at 472. It concluded that, in these circumstances, a showing of "substantial influence" was necessary in order to attribute one's contacts to the other consistent with the requirement of purposeful availment. *Id.* at 469.

Donatelli's substantial influence test does not control the entire universe of cases in which one party's contacts might be attributed to another. By its terms, *Donatelli* applies "in the world of unincorporated associations." *Id.* at 468. Indeed, as *Donatelli* itself observed, the substantial influence test does not control where one seeks to attribute contacts from partner to partnership or from subsidiary to corporate parent. *Id.* at 465-67. In the partnership context, "the activities of the partner are generally attributed to the partnership and jurisdiction over the partnership follows from the partner's contacts, if sufficient, regardless of the absence of independent contacts between the partnership *qua* entity and the forum." *Id.* at 466. *Donatelli*'s substantial influence test does not apply here, where the question is whether an actual or implied agency relationship, sufficient to attribute contacts, existed between the parties. We conclude that, similar to some cases involving actual partnerships, the relationship between the defendants here invokes certain principles of the law of agency, partnership, and joint venture and that these principles permit imputing contacts without the need to show substantial influence.

In addition, although we do not decide whether *Donatelli*'s approach to attribution is necessarily limited to general jurisdiction cases, we note, as stated several times in the *Donatelli* opinion, including in the above quoted passage, that *Donatelli* "focus[ed] . . . upon . . . general as opposed to specific jurisdiction." *Id.* at 463; *see also id.* at 461 (stating the issue on appeal as whether "an unincorporated association is subject to the general personal jurisdiction of every court having jurisdiction over one of its members") (internal quotation marks omitted). This is important because, as *Donatelli* states clearly, the standard for general jurisdiction is more strict than the standard for specific jurisdiction. *Id.* at 463. General jurisdiction requires that the defendant's activities in the forum be "continuous and systematic," *United Elec., Radio & Mach. Workers,* 960 F.2d at 1088, whereas specific jurisdiction requires a lesser showing.

The problem *Donatelli* addresses is, in some ways, more likely to occur in general jurisdiction cases. In general jurisdiction cases, the suit does not arise out of or relate to the defendant's forum contacts. *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414 n. 9, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). *Donatelli* addresses the potentially unjust scenario in which an association, with no direct contacts with a forum, is haled into a forum based on one of its members' continuous and systematic activities in the forum, to answer a lawsuit unrelated to either the member's or the association's in-forum activities. 893 F.2d at 469. Something more is needed to say that the association has purposefully availed itself of the benefits of in-forum activity. Otherwise, the association is subject to a suit in that forum, unrelated to anything the association has done in the forum, by merely

engaging in a limited relationship with a member, that through its own activities engages in continuous and systematic activities in a forum.

Donatelli resolves this problem by holding that, in general jurisdiction cases, the association must "exercise[ ] substantial influence over the member's decision to carry on the in-forum activities which constitute the relevant 'minimum contacts.'" *Id.* This requirement ensures that the association purposefully availed itself of the benefits of the forum, because it links the member's in-forum activity with the association's relationship with that member.

This problem, however, is less likely to arise in specific jurisdiction cases such as this one. Here a direct connection is alleged between the in-forum activities of the agent (the Motley defendants) and the agent's relationship with the principal (the Scruggs defendants). When the cause of action relates to both the association's activities giving rise to the suit *and* to the member's in-forum activities, the same risk of unfairness is not necessarily present. In the present case, Daynard's suit relates to the Scruggs defendants' alleged promise to pay him a share of the fees and to the Motley defendants' activities in Massachusetts, claimed to have been ratified by Scruggs. *Donatelli* is not controlling in this context. It addresses a question different from the inquiry here, which is whether there was an agency relationship between the defendants and whether the Scruggs defendants ratified the Motley defendants' activities in Massachusetts giving rise to Daynard's suit.

But that does not end the matter. We must still determine whether the relationship between the defendants permits imputing a sufficient quantum of the Motley defendants' connections to the Scruggs defendants.

2. Implied agency and ratification.

For purposes of personal jurisdiction, the actions of an agent may be attributed to the principal.[8] Whether or not an agent is initially authorized to act on behalf of a principal, the agent's actions may be attributed to the principal, for purposes of personal jurisdiction, if the principal later ratifies the agent's conduct. *Myers v. Bennett Law Offices,* 238 F.3d 1068, 1073 (9th Cir. 2001); *Wessels, Arnold & Henderson v. Nat'l Med. Waste, Inc.,* 65 F.3d 1427, 1433 (8th Cir. 1995) (attributing contacts where principal "supported, accepted, and followed through on the efforts initiated" by the agent, regardless of whether the agent had authority to act on the principal's behalf). First, we address whether the defendants were in any sort of agency relationship. Second, we discuss whether the Scruggs defendants initially authorized, or later ratified, the Motley defendants' actions.

We disagree with the district court's conclusion that "the defendants were not in any sort of agency relationship." *Daynard,* 184 F.Supp.2d at 74; *see also id.* at 76. Traditional common law concepts support the conclusion

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[8] *See Burger King,* 471 U.S. at 480 n. 22, 105 S.Ct. 2174 (stating that commercial activities carried out on a party's behalf "may sometimes be ascribed to the party," but declining to "resolve the permissible bounds of such attribution"); *Grand Entm't Group, Ltd. v. Star Media Sales, Inc.,* 988 F.2d 476, 483 (3d Cir. 1993) (stating that "[a]ctivities of a party's agent may count toward the minimum contacts necessary to support jurisdiction"); *Sher v. Johnson,* 911 F.2d 1357, 1362 (9th Cir. 1990) (stating that the actions of an agent are attributed to the principal for personal jurisdiction purposes); *see also Donatelli,* 893 F.2d at 466 (noting the general rule that "jurisdiction over a partner confers jurisdiction over the partnership"); *Lewis v. Fresne,* 252 F.3d 352, 359 (5th Cir. 2001) (same).

that the Scruggs defendants' relationship with the Motley defendants suffices to bring the parties within the rule that permits imputation of contacts for jurisdictional purposes.

Section 16 of the Uniform Partnership Act, which is codified in the laws of Massachusetts, Mississippi, and South Carolina, recognizes the common law doctrine of partnership by estoppel – or, in this case, joint venture by estoppel. Unif. P'ship Act § 16(1), 6 U.L.A. 125, 501 (1995); Mass. Gen. Laws ch. 108A, § 16 (2000); Miss. Code Ann. § 79-12-31 (2001); S.C. Code Ann. § 33-41-380 (2001). The Uniform Partnership Act states:

> When a person . . . represents himself, or consents to another representing him to any one, as a partner . . . he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

Unif. P'ship Act, *supra,* § 16(1); *see also Standard Oil Co. v. Henderson,* 265 Mass. 322, 163 N.E. 743, 745 (1928) (stating the common law doctrine of partnership by estoppel).

Partnerships and joint ventures aside, a theory of agency by estoppel is similarly availing to Daynard. Under the Restatement (Second) of Agency,

> [a] person who is not otherwise liable as a party to a transaction purported to be done on his account, is nevertheless subject to liability to persons who have changed their positions because of their belief that the transaction was entered into by or for him, if
>
> (a) he intentionally or carelessly caused such belief, or
>
> (b) knowing of such belief and that others might change their positions because of it, he did not take reasonable steps to notify them of the facts.

Restatement (Second) of Agency § 8B (1958); *accord* H.G. Reuschlein & W.A. Gregory, *The Law of Agency and Partnership* § 25, at 65-66 (2d ed. 1990) (noting that "[c]onduct which leads a third party to believe that the agent has authority and thus creates apparent authority to those persons who act upon it, frequently causes the principal to be liable to those who have changed their position in reliance to their detriment"); L. Lakin & M. Schiff, *The Law of Agency* 38 (1984) (stating an "equitable principle of agency by estoppel" similar to that of the Restatement (Second)).

Even if the defendants' relationship were to fall slightly outside of the confines of these specific doctrines, the question before us is whether a sufficient relationship exists under the Due Process Clause to permit the exercise of jurisdiction, not whether a partnership, joint venture, or other particular agency relationship between the two defendants exists. We think it consistent with the Due Process Clause to attribute to the Scruggs defendants the Motley defendants' retention of, and certain interactions with, Daynard where, as Daynard alleges, they have led

Daynard and the public to believe they were joint venturers. That is a different issue from whether, in a dispute between the two firms, a joint venture agreement could be enforced.

We take the facts alleged and produced by Daynard in the light most favorable to his jurisdictional assertion. Even if the parties were not joint venturers, they held themselves out to Daynard to be part of a joint venture or other agency relationship and are subject, for personal jurisdiction purposes, to the doctrine of estoppel. Daynard, throughout his dealings with the defendants, understood them to be joint venturers. He says the parties "consistently purported to be joint venturers" and that he reasonably relied on this understanding. The question is whether he had a basis for this belief grounded in the Scruggs defendants' own conduct or conduct undertaken with their consent.

In support of his understanding, Daynard states that he believed the firms to be in a joint venture based on their statements and conduct. Daynard states that Patrick was acting for both firms when Patrick retained him and that Patrick retained him to advance the objectives of the joint venture. He says that during this first meeting, Patrick described the tobacco litigation as stemming from a meeting between Scruggs and the Mississippi attorney general, which then resulted in Scruggs "br[inging] the Motley firm into their plans."

Daynard supports his claim with documentary evidence of a joint venture that he unearthed through jurisdictional discovery. Around October 1994, the Scruggs defendants entered into a "Joint Venture Agreement" with several firms to pursue tobacco litigation on behalf of the

state of Mississippi. The Motley defendants claim to have abided by this agreement and their firm's name was listed on the agreement, although they never signed the agreement. In a letter from Joseph Rice of Ness Motley to Richard Scruggs, Rice stated: "As we have discussed several times, we have not signed the Mississippi Joint Venture Agreement solely because we don't want to be governed by Mississippi Tax Law. We are agreeable to all terms in the agreement and, as you know, we have acted under the agreement from the beginning." In the agreement, Ness Motley firm members, including Mr. Motley, were listed as members of several of the "teams" and "committees" forming the "Litigation Management Structure" outlined in the agreement. Mr. Motley was a co-chairman of the "Public Relations Team," which also included Steve Bozeman from Scruggs Millette. Indeed, Ness Motley was counsel of record in the Mississippi case. In addition, Daynard notes that "the two defendant firms were parties to a 'Resolution' which recited that they had both 'made and entered into that certain Joint Venture Agreement' concerning the Mississippi litigation."

Scruggs says that Ness Motley did not sign the joint venture agreement, that Ness Motley did not perform under the agreement's terms, and that the litigation team did not function as outlined in the agreement. He says Ness Motley did not make the capital contributions specified in the agreement, that there was a distinction between being counsel of record and being a party to the joint venture agreement, and that Ness Motley's failure to sign the agreement caused "great concern." Scruggs says that, upon receiving the letter from Rice, stating that Ness Motley had "acted under the agreement from the beginning," he called Rice and told him that "this wasn't good

enough" and that "nobody else" considered Ness Motley to have performed under the agreement.

Scruggs concedes, however, that the profits from the Mississippi litigation, outlined in this agreement, were eventually divided with Ness Motley, but he says that the division was under the terms of a 1999 agreement. Scruggs states that his "understanding with Ness Motley was always that at the end of the day, we would attempt to negotiate a fee and expense sharing arrangement, each trusting the goodwill of the other to reach a successful negotiation, but without any guarantee that we would." In addition, Scruggs admits that "[t]here was a general cooperative effort between [Scruggs Millette and Ness Motley] to advance litigation against the tobacco industry."

Daynard then says that after Motley hired him, he began a course of dealing with the defendants in which he provided both firms with legal advice, including advice to members of the Scruggs firm physically present in Boston, as well as assistance provided from Boston by phone and fax. Daynard also cites several conversations with both Scruggs and Motley in which they agreed to pay him a share of the fees obtained by *both* firms, Scruggs's statement that Scruggs had at least apparent authority to promise the 5%, and Motley's statement that he would be compensated as part of the "team."

Daynard cites a popular book about the tobacco litigation, which he says describes Ness Motley and Scruggs Millette as joint venturers beginning in 1993, as evidence that the firms were engaged in a well publicized joint venture or at least held themselves out to be so engaged. *See* M. Orey, *Assuming the Risk: The Mavericks, the Lawyers, and the Whistle-Blowers Who Beat Big*

Tobacco 265 (1999) (stating that Scruggs, Motley, and two others, were the "nucleus" of a tobacco litigation "team," which "drafted a joint-venture agreement that spelled out in elaborate detail the duties each of the lawyers would perform"). He notes, as additional evidence of public perception, that in the Texas tobacco litigation, other lawyers sent the firms checks made payable to "Ness Motley/Scruggs." At least four such checks appear in the record.

Finally, in support of his claim that the defendants held themselves out to be joint venturers, Daynard presents a 1998 letter to Hawaii's attorney general, from Joseph Rice of Ness Motley, stating that "Ness, Motley has an arrangement with Richard Scruggs to work jointly on all of the state cases against the Tobacco Industry." Noting that "[w]e have no formal, written agreement," he said "Ness, Motley and Dick Scruggs have been doing business together for almost ten years and have never had any differences. We fully anticipate sitting down in hindsight and determining what the division of any recoveries would be between the two law firms."

Scruggs said that he considered Rice's statement that "Ness, Motley has an arrangement with Richard Scruggs to work jointly on all of the state cases against the Tobacco Industry" to be "a bit of an overstatement." On the other hand, Rice's letter to Hawaii's attorney general said "I am sending a copy of this letter to Dick so he may respond likewise, if he has any questions or any additions." Scruggs did not write anything to contradict Rice's characterization and stated, in his deposition, that "[t]here was no reason to contradict it." Scruggs conceded that "[t]here was a general cooperative effort between [Scruggs Millette and Ness Motley] to advance litigation against the tobacco

industry." Although this letter may not go to Daynard's understanding of the firms' relationship, and although it was written by Rice of Ness Motley, not by any of the Scruggs defendants, Scruggs's silence carries at least some weight.

The facts as alleged by Daynard are sufficient to make the jurisdictional showing that, in Boston, Patrick of Ness Motley hired Daynard, that Daynard reasonably understood Patrick to be acting on behalf of a joint venture or other agency relationship between Ness Motley and Scruggs Millette, and that Daynard relied on this understanding by providing his services to both defendants.

Many of these same facts support the conclusion that the Scruggs defendants subsequently ratified the Motley defendants' conduct. Even if Patrick, when he hired Daynard, was acting without actual authority from the Scruggs defendants, Daynard says Patrick purported to act as an agent for both firms when Patrick retained Daynard, and that Scruggs effectively ratified that representation.

"A person may ratify a prior act done by another without actual or apparent authority .... by ... conduct that is justifiable only on the assumption that the person so consents." Restatement (Third) of Agency § 4.01 (Tentative Draft No. 2, 2001).[9] "The sole requirement for ratification is a manifestation of assent or other conduct indicative of consent by the principal." Restatement (Third) of Agency,

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[9] As described in the Restatement (Second), "Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." Restatement (Second) of Agency, *supra*, § 82.

supra, § 4.01, cmt. b; *see also Inn Foods, Inc. v. Equitable Coop. Bank,* 45 F.3d 594, 597 (1st Cir. 1995) (stating that "[u]nder Massachusetts law, ratification of an agent's acts may be express or implied"). The Scruggs defendants, on the facts alleged, engaged in such conduct.

After Ness Motley retained Daynard, and as a result of this employment, Daynard asserts that he began providing information directly to the Scruggs defendants. Daynard says that he "communicated regularly" with the Scruggs defendants, that they came to Boston to receive his advice, and that he "had many conversations, meetings and written communications in Boston with members of the defendant firms, in which [he] provided advice and undertook specific projects for their use in the tobacco litigation." Even if the Scruggs defendants did not come to Boston, we think there is adequate other evidence of ratification, accepting Daynard's allegations.

Daynard says that he had "several conversations" with "both Mr. Motley and Mr. Scruggs in which they stated that they would appropriately compensate [Daynard] . . . and that the final form of compensation would be" in the form of a share of the fees the firms obtained from handling the state tobacco litigation. Daynard says Ronald Motley advised him that he would be compensated for his assistance as a member of the Ness Motley "team." Further evidence of ratification comes from Daynard's version of the Chicago meeting, where Scruggs said he acted with at least apparent authority for both firms and reached an agreement. Daynard says that Scruggs shook hands on a deal to pay him 5% of these fees. These assurances and reassurances that Daynard would be paid a portion of the recovered fees were an integral part of the

ongoing relationship existing between Daynard, the Motley defendants, and the Scruggs defendants.

Finally, Daynard asserts that in reliance on his arrangements with the Scruggs defendants and at their request, he had to commit out-of-pocket expenses of $15,000 to retain someone to meet his teaching obligations. Again, there is no evidence that Scruggs disavowed any contractual relationship as he accepted Daynard's assistance. To be sure, Scruggs says Daynard was a volunteer, but reasonable inferences support Daynard's version.

The Scruggs defendants had many opportunities to disavow a relationship with Daynard or to clarify the relationship. For example, they could have rejected his assistance or accepted it only on certain conditions. Instead, according to Daynard, they repeatedly encouraged and accepted his assistance and during several conversations agreed to pay him in the form of a share of the fees generated. When Daynard wrote his first letter to Scruggs in July 1997 confirming the fee arrangement, Scruggs remained silent.[10]

By knowingly accepting the benefits of the transaction initiated in Massachusetts, the Scruggs defendants ratified Patrick's act of hiring and retaining Daynard on behalf of

[10] It was not until November 1997, after Daynard had provided years of services and the firms were expecting to reap significant financial rewards from at least the Mississippi and Florida litigation, that Scruggs responded to Daynard's second letter, after he ignored the first letter, and disavowed the 5% fee arrangement. Daynard asserts that, even at this point, Scruggs disputed only the extent of Daynard's compliance with the agreement, not the existence of the agreement.

both firms, which ultimately gave rise to this law suit. *See Inn Foods,* 45 F.3d at 597 n. 7 (noting that "benefits received are certainly strong evidence that the principal acquiesced in the agent's transaction"); Restatement (Third) of Agency, *supra,* § 4.01, cmt. d. In addition, by repeatedly agreeing to compensate Daynard for ongoing work conducted in Massachusetts, agreeing to pay Daynard a share of the fees and later shaking hands on the 5% figure, and accepting his coming from Boston to Mississippi to assist at trial, Scruggs, acting on behalf of his firm and, according to Daynard, the Ness Motley firm as well, ratified the arrangement in which the Motley defendants agreed to pay Daynard for his ongoing services as a member of the team.

D. The Remaining Constitutional Analysis

The easier question in the case is the remaining constitutional one. Given the Scruggs defendants' direct contacts with Massachusetts and their contacts imputed from the Motley defendants, do the Scruggs defendants have "minimum contacts" with Massachusetts "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"? *Int'l Shoe,* 326 U.S. at 316, 66 S.Ct. 154 (quoting *Milliken,* 311 U.S. at 463, 61 S.Ct. 339). The answer is yes.

For specific jurisdiction, this circuit divides the constitutional analysis into three categories: relatedness, purposeful availment, and reasonableness:

> First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's

> forum-state activities. Second, the defendant's in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable.

Foster-Miller, 46 F.3d at 144; *see also Noonan,* 135 F.3d at 90. The Supreme Court, speaking on the subject of specific personal jurisdiction in contract cases, has "emphasized that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *Burger King,* 471 U.S. at 473, 105 S.Ct. 2174 (quoting *Travelers Health Ass'n v. Virginia,* 339 U.S. 643, 647, 70 S.Ct. 927, 94 L.Ed. 1154 (1950)).

1. Relatedness.

As to the first requirement, that "the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state activities," *Foster-Miller,* 46 F.3d at 144, the district court correctly concluded, based merely on the Scruggs defendants' direct contacts with the forum, that the alleged

> breach of contract in this case "arose" from a course of dealing between the parties. The contract was in the form of a working relationship – started in Massachusetts – that called for interaction between Massachusetts, South Carolina, and Mississippi. Drawing all inferences in favor

> of Daynard, he arguably meets the relatedness requirement,

Daynard, 184 F.Supp.2d at 66. It is clear that Daynard's breach of contract claim "arise[s] out of, or relate[s] to," the Scruggs defendants' Massachusetts activities. *Foster-Miller,* 46 F.3d at 144. Daynard's lawsuit is based on his claim that the defendants owe him money for his work pursuant to an agreement initiated by the defendants while physically present in Massachusetts and performed, in part, in Massachusetts. This relationship contemplated ongoing interaction between Daynard, in Massachusetts, and the defendants, in Mississippi and South Carolina. Daynard's suit arises out of these Massachusetts activities, which were instrumental to the formation of the disputed oral contract. *See McGee v. Int'l Life Ins. Co.,* 355 U.S. 220, 223, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957) (upholding jurisdiction over a suit "based on a contract which had substantial connection with th[e] State"); *Hahn v. Vt. Law Sch.,* 698 F.2d 48, 51-52 (1st Cir. 1983).

2. Purposeful availment.

"Second, the defendant's in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable." *Foster-Miller,* 46 F.3d at 144. "The cornerstones upon which the concept of purposeful availment rest[s] are voluntariness and foreseeability." *Sawtelle,* 70 F.3d at 1391 (citing *Ticketmaster,* 26 F.3d at 207).

The district court's reasoning on purposeful availment considered only the Scruggs defendants' direct contacts and found them insufficient. We need not address this conclusion as Daynard has not challenged it on appeal. We note, however, that, as the district court recognized, Scruggs did have some contacts with Massachusetts, however minimal. The Scruggs defendants, according to Daynard, engaged in telephone and fax communications with him in Massachusetts.[11] In addition, Daynard says the Scruggs defendants also had conversations with him, in which they agreed to pay him a share of the fees as compensation for work performed in Massachusetts. He also says that Scruggs firm members came to Boston to receive his advice, although Scruggs denies this.

Combined with Patrick's physical presence in Massachusetts to negotiate the agreement which ultimately gave rise to this litigation, and the ongoing relationship between the Motley defendants and Daynard – properly attributed to the Scruggs defendants – we can properly say that the Scruggs defendants "engaged in . . . purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable," *Rush v. Savchuk,* 444 U.S. 320, 329, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980). *See Burger King,* 471 U.S. at 479, 105 S.Ct. 2174

[11] "The transmission of facts or information into Massachusetts via telephone or mail would of course constitute evidence of a jurisdictional contact directed into the forum state." *Mass Sch. of Law,* 142 F.3d at 36; *see also Burger King,* 471 U.S. at 476, 105 S.Ct. 2174 (stating that "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines" and that defendants may not defeat jurisdiction merely by showing that they never physically entered the forum).

(holding that "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing" must be evaluated to determine whether the defendant purposefully established minimum contacts). Patrick's action alone is probably sufficient to support jurisdiction over the Motley defendants and, when imputed, the Scruggs defendants as well. *See id.* at 475 n. 18, 105 S.Ct. 2174 (noting that "[s]o long as it creates a 'substantial connection' with the forum, even a single act can support jurisdiction") (quoting *McGee,* 355 U.S. at 223, 78 S.Ct. 199); R.C. Casad & W.B. Richman, 1 *Jurisdiction in Civil Actions: Territorial Basis and Process Limitations on Jurisdiction of State and Federal Courts* § 4-2, at 413 (3d ed. 1998) (stating that "if the defendant or its agent was physically present in the state to negotiate the service contract, cases have found that the defendant transacted business there"). Even in cases where the defendant was not physically present in the forum, where the defendant initiated the transaction by mailing or calling the plaintiff in the forum and when the defendant contemplated that the plaintiff would render services in the forum, all as alleged by Daynard here, many courts have found jurisdiction. Casad & Richman, *supra,* § 4-2, at 414.

3. Reasonableness.

"Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable." *Foster-Miller,* 46 F.3d at 144; *see also World- Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 292, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) (listing factors). The Gestalt factors support the conclusion that jurisdiction is reasonable.

The burden on the Scruggs defendants of appearing in Massachusetts, given that they routinely represent clients outside their home state, is not by any means unusual. In addition, Daynard's interest in bringing his action in this forum, given the traditional deference accorded to a plaintiff's choice of forum, weighs in favor of personal jurisdiction. This is particularly true in light of Massachusetts's stake in being able "to provide a convenient forum for its residents to redress injuries inflicted by out-of-forum actors." *Sawtelle,* 70 F.3d at 1395. Massachusetts's adjudicatory interest is likely to weigh in favor of exercising personal jurisdiction because the district court has already decided that, as between Daynard and the Motley defendants, Massachusetts law governs the dispute over the oral fee-splitting arrangement. *Daynard,* 188 F.Supp.2d at 118-23. Finally, efficient administration of justice favors jurisdiction in Massachusetts, where this action is already proceeding against the Motley defendants.

E. Conclusion

We conclude that the Scruggs defendants' contacts properly imputed from the Motley defendants, against the backdrop of the Scruggs defendants' direct contacts with Massachusetts, constitute "minimum contacts" with Massachusetts "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe,* 326 U.S. at 316, 66 S.Ct. 154 (quoting *Milliken,* 311 U.S. at 463, 61 S.Ct. 339). Again, we emphasize that we reach this conclusion under the prima facie approach, taking Daynard's properly documented evidentiary proffers "as true (whether or not disputed) and construe[ing] them in the light most congenial to [Daynard's] jurisdictional claim." *Mass. Sch. of Law,* 142 F.3d at 34.

Nothing in the opinion precludes the Scruggs defendants, in the prospective district court proceedings, from challenging these facts, if they wish, and renewing their jurisdictional challenge, if appropriate.

III.

For these reasons, we *reverse* the dismissal of the Scruggs defendants for lack of personal jurisdiction and *remand* to the district court for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 01-2595

RICHARD A. DAYNARD,
Plaintiff, Appellant,

v.

NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE, P.A.; RONALD L. MOTLEY,
Defendants.

SCRUGGS, MILLETTE, BOZEMAN & DENT, P.A.; RICHARD F. SCRUGGS, Defendants, Appellees.

JUDGMENT

Entered: May 10, 2002

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The dismissal of the Scruggs defendants for lack of personal jurisdiction is reversed and the cause is

remanded to the district court for further proceedings consistent with this opinion.

By the Court:

Richard Cushing Donovan, Clerk

By /s/ JANICE M. O'NEIL
Chief Deputy Clerk

[cc: Messrs: Barshak and Prignano]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 01-10099-WGY

RICHARD DAYNARD
Plaintiff

v.

NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE, P.A.; RONALD L. MOTLEY, SCRUGGS, MILLETTE, BOZEMAN & DENT, P.A. and RICHARD SCRUGGS
Defendants.

ORDER OF DISMISSAL/JUDGMENT

YOUNG,C.J.

After a hearing held on Sept. 13, 2001, this Court Orders that Defendants' Scruggs, Millette, Bozeman & Dent, P.A. and Richard Scruggs' Motion to Dismiss is Allowed and the above entitled action be and hereby is Dismissed as against Scruggs, Millette, Bozeman & Dent, P.A. and Richard Scruggs.

Tony Anastas
Clerk

By: /s/ Elizabeth Smith
Deputy Clerk

November 6, 2001

Notice mailed to counsel of record.

184 F.Supp.2d 55

United States District Court,
D. Massachusetts.

Richard A. DAYNARD, Plaintiff,
v.
NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE, P.A.; Ronald Motley; Scruggs, Milette, Bozeman & Dent, P.A.; and Richard F. Scruggs, Defendants.

No. CIV.A.01-10099-WGY.

Dec. 21, 2001.

Edward J. Barshak, Sugarman, Rogers, Barshak & Cohen, Boston, MA, for Plaintiff.

Michael E. Mone, Esdaile, Barrett & Esdaile, Boston, MA, *Mark A. Pogue*, Edwards & Angell, LLP, Providence, RI, *Stephen M. Prignano*, Edwards & Angell, LLP, Providence, RI, for Defendants.

MEMORANDUM

YOUNG, Chief Judge.

The plaintiff, a local law professor, brought suit against two sets of defendants, one from Mississippi and the other from South Carolina. The suit has occasioned three hearings before the Court. At the first hearing, the Court held that the plaintiff failed to show why the Mississippi defendants should be subject to personal jurisdiction in Massachusetts. The Court did, however, allow the plaintiff jurisdictional discovery, which led to a second hearing on the matter of personal jurisdiction. At that hearing, the Court dismissed the Mississippi defendants for lack of personal jurisdiction and soon after entered partial judgment in their favor, thus permitting the

plaintiff to appeal the ruling immediately. At the third hearing, the Court heard from the South Carolina defendants, who argued that without the Mississippi defendants the case either should be (i) dismissed for failure to join an indispensable party or (ii) transferred to Mississippi. The Court rejected both arguments. This memorandum explains these rulings.

I. INTRODUCTION

As recounted by this Court in an earlier memorandum:

> The plaintiff, Professor Richard A. Daynard ("Daynard") of Northeastern University School of Law, has spent much of his academic career studying how to defeat the tobacco industry in court. Compl. ¶¶ 21-29. The defendants – the Ness law firm and one of its partners, Mr. Motley (together "the South Carolina defendants"), and the Scruggs law firm and one of its partners, Mr. Scruggs (together "the Mississippi defendants") – were among the many law firms representing state governments in the titanic battle against the tobacco industry ("the State Tobacco Litigation"). *Id.* ¶¶ 15-19.
>
> Between 1993 and 1997, Daynard provided advice to the defendants. Daynard Aff. ¶¶ 1-2. No written contract detailed how Daynard would be compensated, but Daynard alleges that he and one of the Mississippi defendants shook hands in Chicago, Illinois in 1996 on an agreement whereby he would receive 5% of any attorneys' fees paid to the defendants as a result of the State Tobacco Litigation. *Id.* ¶ 4. In 1997 and 1998, the tobacco industry agreed to settle the

> State Tobacco Litigation for billions of dollars. Since then, the defendants have received millions of dollars in attorneys' fees and Daynard has received nothing. Answer ¶¶ 65-66.

Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 178 F.Supp.2d 9, 10 (2001).

Daynard filed a complaint in state court, which the defendants properly removed to this Court. 28 U.S.C. §§ 1332(a)(1), 1441(a). The South Carolina defendants consented to personal jurisdiction and answered the complaint. The Mississippi defendants, on the other hand, contested personal jurisdiction and did not answer the complaint, Fed.R.Civ.P. 12(b)(2), which led to the first hearing in this case.

II. MISSISSIPPI DEFENDANTS

A. Personal Jurisdiction

The first hearing took place on May 31, 2001. At that hearing, Daynard argued that the Court had personal jurisdiction over the Mississippi defendants by virtue of *their* contacts with Massachusetts. The following discussion – like all the subsequent discussions in this memorandum – is written from the Court's perspective at the time of the hearing in question, in this instance May 31, 2001.

1. Procedural Posture

Under Rule 12(b)(2), the Court may employ a range of procedures to resolve questions of personal jurisdiction. *Foster-Miller, Inc. v. Babcock & Wilcox Can.*, 46 F.3d 138, 145-47 (1st Cir. 1995) (delineating separate "prima facie,"

"preponderance of the evidence," and "likelihood" standards). The "prima facie" standard is the "most conventional." *Id.* at 145. Accordingly, absent any reason to refrain from so doing, the Court will employ it. Under the prima facie standard, Daynard ultimately bears the burden of persuading the Court that personal jurisdiction exists over the Mississippi defendants, but at this preliminary stage of the case, before any disputed jurisdictional facts have been resolved, Daynard need only make a prima facie showing of personal jurisdiction. *See, e.g., Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n,* 142 F.3d 26, 33-34 (1st Cir. 1998). Accordingly, the Court will take the specific facts affirmatively alleged by Daynard as true (whether or not disputed) and construe them in the light most favorable to the jurisdictional claim. Next the Court will "add to the mix" those facts put forward by the Mississippi defendants "to the extent that they are uncontradicted." *Id.* at 34. Given this universe of facts, the Court will decide whether Daynard makes a prima facie showing of personal jurisdiction over the Mississippi defendants.

2. Facts

The Mississippi defendants present undisputed facts that they did not represent Massachusetts in the State Tobacco Litigation, they have no partners, employees, or property in Massachusetts, they never met with Daynard in Massachusetts, and their overall contact with Massachusetts in general and Daynard in particular was minimal or nonexistent. Defs.' Facts ¶¶ 7-12 [Docket No. 12].

Daynard paints a more complex picture.[1] He first got involved with the defendants in 1993, when the South Carolina defendants traveled to Massachusetts to seek his specialized knowledge in tobacco litigation. Daynard Aff. ¶ 1 [Docket No. 17]. As a result of that meeting, and many other meetings with the defendants that took place outside of Massachusetts, Daynard regularly communicated with both the South Carolina and the Mississippi defendants. *Id.* ¶ 2; Compl. ¶¶ 33-35. Daynard provided the defendants with extensive documentation that he had compiled over the years, introduced the defendants to experienced tobacco litigators and interested state government officials, and generally provided advice. Daynard Aff. ¶ 2; Compl. ¶¶ 36-38. Daynard performed most of these tasks from his office in Massachusetts.

After the State Tobacco Litigation began in 1994, Daynard was appointed counsel-of-record for several states, including Florida, Maryland, and Massachusetts, and worked with the defendants on issues relating to litigation in Florida and Mississippi. Compl. ¶ 41. To help the defendants, Daynard incurred communication and travel expenses, as well as payments to Northeastern University to reduce his teaching obligations. Daynard Aff. ¶ 2; Compl. ¶ 49.

Daynard and the defendants were in Chicago, Illinois for the Democratic National Convention around August 25, 1996. Compl. ¶ 55. Daynard was advised that the

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[1] The facts recited in this section are consistent with, but do not draw upon, the affidavit Daynard filed in preparation for the *second* hearing on personal jurisdiction. *See* Daynard Aff. ¶¶ 1, 3-7, 10, 12, 16, 21, 26-28 [Docket No. 50].

defendants wanted to meet with him to discuss his share of any fee awards. The South Carolina defendants apparently were unable to meet with Daynard as only the Mississippi defendants showed up. *Id.* ¶ 56. At the meeting, Mr. Scruggs and Daynard orally agreed that Daynard would receive 5% of any fees recovered in the State Tobacco Litigation. Daynard Aff. ¶ 4; Compl. ¶¶ 57-58. As a result of this agreement, Daynard continued to provide advice to the defendants and continued to incur expenses. Daynard Aff. ¶ 4; Compl. ¶ 60.

Following the tentative settlement of the Mississippi litigation, Daynard wrote to the Mississippi defendants in July 1997 to confirm the oral agreement reached the previous year. The Mississippi defendants never responded to the letter. Compl. ¶ 61. Following the tentative settlement of the Florida litigation, Daynard wrote to both the South Carolina and the Mississippi defendants in October 1997 to confirm the oral agreement reached the previous year. *Id.* ¶ 62. On November 7, 1997, the South Carolina defendants disavowed the oral agreement; on November 20, 1997, the Mississippi defendants did the same. *Id.* ¶ 63.

Daynard has never received any compensation from the Mississippi defendants. *Id.* ¶ 40.

3. Discussion

Personal jurisdiction over a distant defendant in a diversity action may be obtained by consent, *e.g.*, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999), or proper service of process as allowed by the forum state's long-arm statute, Fed.R.Civ.P. 4(k)(1)(A). The South Carolina defendants have consented

to personal jurisdiction but the Mississippi defendants have not. Accordingly, the Court cannot assert personal jurisdiction over the Mississippi defendants until Daynard demonstrates that the Mississippi defendants lie within the reach of the Massachusetts long-arm statute as cabined by the Due Process Clause of the Fourteenth Amendment. *E.g., Lyle Richards Int'l, Ltd. v. Ashworth, Inc.*, 132 F.3d 111, 112 (1st Cir. 1997).

Before turning to the law, a few observations about the facts ought be highlighted. Daynard alleges that *he* communicated with the Mississippi defendants while *he* was in Massachusetts, but he is less clear with respect to how the *Mississippi defendants* made contact with Massachusetts; the communications into Massachusetts, according to Daynard, were from the South Carolina defendants. Although Massachusetts courts construe their long-arm statute broadly, neither the long-arm statute nor Due Process allows the unilateral actions of the *plaintiff* to confer jurisdiction. The focus is on the actions of the defendant, and in this case the facts portray the Mississippi defendants as the passive recipients of information, no different than a person in Mississippi watching the Boston Red Sox on television. The Mississippi defendants admit being present in Massachusetts on a few occasions, but never in connection with Daynard. Otherwise the Mississippi defendants present undisputed facts that they have no partners, employees, or property in Massachusetts and they never paid Daynard. Furthermore, none of Daynard's communications with the Mississippi defendants concerned the tobacco litigation in Massachusetts; Daynard's complaint explicitly disclaims any fees as a result of the Massachusetts litigation. Compl. at 16 n. 1. In short, Daynard simply does not assert many facts

showing how the Mississippi defendants made contact with Massachusetts.

If this Court were to assert personal jurisdiction over the Mississippi defendants based on their contacts, it would have to do so on a theory akin to unjust enrichment: the Mississippi defendants knew Daynard was working for them in Massachusetts, they accepted his work product, and they encouraged him to continue working there, but when it came time to pay Daynard, they disavowed any contacts with him or Massachusetts. Unfortunately for Daynard, this approach to personal jurisdiction contravenes conventional wisdom:

> Where the client made no physical entry into the forum state, the fact that the professional physically performed the services in the forum state usually has not been sufficient contact to support long-arm jurisdiction over the client, unless the transaction was initiated by the defendant or the parties had engaged in similar transactions in the past.

2 Robert C. Casad & William B. Richman, *Jurisdiction in Civil Actions* § 8-11 [1][a], at 217-19 (3d ed. 1998) (footnotes omitted).

The following discussion takes the ideas above and tests them against the law of personal jurisdiction, especially the law as recently stated in the plethora of pellucid opinions by the First Circuit. The discussion proceeds in the traditional two-step fashion, first by examining whether the Massachusetts long-arm statute grants the Court jurisdiction to haul the Mississippi defendants into the forum, and second by examining whether it would be constitutional to exercise that jurisdiction.

a. Massachusetts Long-Arm Statute

The Massachusetts long-arm statute provides, in relevant part:

> A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's
>
> (a) transacting any business in this commonwealth;
>
> (b) contracting to supply services or things in this commonwealth;
>
> (c) causing tortious injury by an act or omission in this commonwealth;
>
> (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth[.]

Mass. Gen. Laws ch. 223A, § 3; *accord* Unif. Interstate & Int'l Procedure Act § 1.03, 13 U.L.A. 355, 361-62 (1986). The long-arm statute recognizes two types of jurisdiction: specific and general. Subsections (a), (b), and (c) are forms of specific jurisdiction, in which the cause of action arises out of the defendant's activity in the forum. Subsection (d), in contrast, is a form of general jurisdiction, in which the cause of action does not concern the defendant's activity in the forum, but jurisdiction nevertheless is proper because of the defendant's "persistent course of conduct" or "substantial revenue from goods" in the forum. *See Conn. Nat'l*

Bank v. Hoover Treated Wood Prods., Inc., 37 Mass.App.Ct. 231, 233 n. 6, 638 N.E.2d 942 (1994); *see also Noonan v. Winston Co.*, 135 F.3d 85, 92-94 (1st Cir. 1998) (considering general jurisdiction under subsection (d)). In his complaint, Daynard asserts jurisdiction over all the defendants under subsections (a), (c), and (d), Compl. ¶ 12, but with respect to the Mississippi defendants, both parties correctly focus their attention only on subsection (a), the "transacting any business" prong of specific jurisdiction.

The long-arm statute requires that the cause of action "arise from" a specific transaction of business in the forum. Massachusetts employs a very broad "but for" test which is easily met. *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 770-71, 625 N.E.2d 549 (1994). In this case, the alleged breach of contract would not have happened "but for" the antecedent business transactions between the defendants and Daynard in Massachusetts.

The phrase "transacting any business in this commonwealth" has also been construed broadly. "[G]enerally the purposeful and successful solicitation of business from residents of the Commonwealth, by a defendant or its agent, will suffice to satisfy this requirement." *Id.* at 767, 625 N.E.2d 549. In *Tatro*, the Supreme Judicial Court held that a single telephone call from a hotel to a Massachusetts resident was sufficient to meet the "transacting any business" test because the call was part of a broader effort to generate business from Massachusetts residents. *Id.* at 768-69, 625 N.E.2d 549. In this case, the South Carolina defendants were the ones who formed the initial relationship with Daynard, but Daynard alleges that he had telephone conversations with the Mississippi defendants throughout the relationship, which conceivably could suffice as transacting business in Massachusetts. *Compare*

Good Hope Indus., Inc. v. Ryder Scott Co., 378 Mass. 1, 6-7, 389 N.E.2d 76 (1979) (defining "transacting any business" to include defendants's regular communications to buyer in Massachusetts), *with Lyle Richards,* 132 F.3d at 113 (rejecting jurisdiction where agreement was to be performed outside Massachusetts and plaintiff had initiated transaction), *and N.H. Ins. Guar. Ass'n v. Markem Corp.*, 424 Mass. 344, 348-50, 676 N.E.2d 809 (1997) (rejecting jurisdiction over defendants buying from, as opposed to selling to, Massachusetts). As this Court recently stated, "contrary to [the defendant's] contention, section 3(a) does not require that the business be transacted within the physical bounds of Massachusetts. The fact that '[the defendant] never set foot in Massachusetts in connection with the proposed transaction' does not prevent the Court from exercising jurisdiction over [the defendant]." *JMTR Enters., LLC v. Duchin,* 42 F.Supp.2d 87, 96 (D.Mass. 1999) (citations omitted).

The Court need not dwell on what constitutes "transacting any business," however, because "the Massachusetts long-arm statute functions as an assertion of jurisdiction over the person to the limits allowed by the Constitution of the United States." *Tatro,* 416 Mass. at 771, 625 N.E.2d 549 (internal quotation marks omitted) (quoting, inter alia, *Good Hope Indus.,* 378 Mass. at 6, 389 N.E.2d 76). "It behooves us, therefore, to truncate our statutory analysis and enter the constitutional copse." *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1087 (1st Cir. 1992) [hereinafter *163 Pleasant St. I*], *appeal after remand,* 987 F.2d 39 (1st Cir. 1993) [hereinafter *163 Pleasant St. II*].

b. Due Process

"[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Over time, this "elastic standard [ ]," *id.* at 325, 66 S.Ct. 154 (Black, J., concurring in judgment), has been recast as a tripartite analysis: *First,* Daynard's claim must directly arise out of, or relate to, the Mississippi defendants' contacts with Massachusetts. *Second,* the Mississippi defendants' contacts with Massachusetts must represent a purposeful availment of the privilege of conducting activities in Massachusetts, thereby invoking the benefits and protections of Massachusetts' laws and making the Mississippi defendants' involuntary presence before Massachusetts courts foreseeable. *Third,* the exercise of jurisdiction must be reasonable, taking into consideration factors such as (i) the Mississippi defendants' burden of appearing, (ii) Massachusetts' interest in adjudicating the dispute, (iii) Daynard's interest in obtaining convenient and effective relief, (iv) the judicial system's interest in obtaining the most effective resolution of the controversy, and (v) the common interests of all sovereigns in promoting substantive social policies. *See, e.g., Phillips Exeter Acad. v. Howard Phillips Fund, Inc.,* 196 F.3d 284, 288 (1st Cir. 1999); *Nowak v. Tak How Invs., Ltd.,* 94 F.3d 708, 712-13, 717 (1st Cir. 1996); *Sawtelle v. Farrell,* 70 F.3d 1381, 1389, 1394 (1st Cir. 1995); *163 Pleasant St. I,* 960 F.2d at 1089 (introducing tripartite analysis). *See generally* 4A Charles

Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1069, at 33-74 (3d ed. 2002).

The Supreme Court twice has considered the modern notion of personal jurisdiction in the context of a contract dispute. In the first case, *McGee v. International Life Insurance Co.,* 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), the Supreme Court allowed California to assert personal jurisdiction over an insurance company that had no contact with California except for a *single* insurance contract with the plaintiff, who had moved to California before dying. In the second case, *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), the Supreme Court explained how a contract can form the basis for personal jurisdiction:

> The Court long ago rejected the notion that personal jurisdiction might turn on "mechanical" tests, or on "conceptualistic . . . theories of the place of contracting or of performance." Instead, we have emphasized the need for a "highly realistic" approach that recognizes that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." It is these factors – prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing – that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

Id. at 478-79, 105 S.Ct. 2174 (citations omitted).

With these thoughts in mind, the Court turns to the first prong of the tripartite analysis.

(1) Relatedness or "Arising out of"

"We have approached the relatedness inquiry with slightly different emphases when the plaintiff asserts a contract claim [than] when [he] asserts a tort claim: if a contract claim, our stereotypical inquiry tends to ask whether the defendant's forum-based activities are 'instrumental in the formation of the contract'. . . . " *Mass. Sch. of Law,* 142 F.3d at 35. If a tort claim, the inquiry focuses on causation. Unlike the Massachusetts long-arm statute, which uses a broad "but for" test to determine relatedness, *see supra* p. 64, Due Process uses a more focused test closer to "proximate cause," *see Nowak,* 94 F.3d at 713-16. In particular, the First Circuit looks for a "nexus," which is described as "a small overlay of 'but for' on 'proximate cause.'" *Id.* at 715-16.

The First Circuit examined the question of relatedness in *Phillips Exeter.* In that case, Phillips Exeter Academy brought suit in its home state of New Hampshire against a trust fund in Florida that allegedly was not paying enough money. After the fund was established in Florida by a devoted alumnus of Phillips Exeter Academy, the fund routinely sent checks to New Hampshire and occasionally visited the school. The First Circuit held that New Hampshire did not have personal jurisdiction over the Florida defendant, however, because the formation of the underlying trust and all the important decisions with respect to how the trust would be operated were made in Florida without any interaction with New Hampshire. 196 F.3d at 290-91. The First Circuit also rejected the argument that the forum contacts were "related" to the cause of action simply because the *consequences* of the alleged breach of contract were felt in New Hampshire. Although the First Circuit recognized that the location where

payments are due is relevant to the jurisdictional calculus, the First Circuit was unwilling to say that the defendant's payments to New Hampshire were "related" to the breach of contract. *Id.* at 291. In short, the contract was negotiated and "set in motion" in Florida, well before any contacts with New Hampshire, so the First Circuit held that the breach of contract "arose" out of Florida, not New Hampshire.

Phillips Exeter reflects the First Circuit's keen interest in whether "the defendant's contacts with the forum were instrumental either in the formation of the contract or in its breach." *Id.* at 289 (citing, inter alia, *163 Pleasant St. I,* 960 F.2d at 1089-90). In the case at bar, the initial agreement indeed was formed in Massachusetts in 1993. Although it was the South Carolina defendants, not the Mississippi defendants, who initially formed the agreement, the Mississippi defendants' absence need not be fatal. For one, the South Carolina defendants arguably acted as the Mississippi defendants' emissary. In the words of *Burger King,* the "contemplated future consequence" of the 1993 meeting and the "actual course of dealing" over time was a close working relationship between Daynard in Massachusetts and the defendants in South Carolina and Mississippi. Furthermore, when the Mississippi defendants met with Daynard in Chicago, Illinois, the "contemplated future consequence" again was a course of dealing with Daynard in Massachusetts.

In contrast to *Phillips Exeter,* which turned on a single, out-of-forum transaction that determined the contract, the breach of contract in this case "arose" from a course of dealing between the parties. The contract was in the form of a working relationship – started in Massachusetts – that called for interaction between Massachusetts,

South Carolina, and Mississippi. Drawing all inferences in favor of Daynard, he arguably meets the relatedness requirement.

(2) Purposeful Availment

The second prong of the tripartite analysis is "purposeful availment." "In order to be subject to Massachusetts' jurisdiction, a defendant need only have one contact with the forum state, so long as that contact is meaningful." *Nowak,* 94 F.3d at 717 (citing *McGee* and *Burger King*). That being said, "the cornerstones upon which the concept of purposeful availment rest are voluntariness and foreseeability." *Sawtelle,* 70 F.3d at 1391.

Sawtelle explains why Daynard cannot show purposeful availment. The case involved a set of facts reminiscent of those presently before the Court: A resident of New Hampshire retained a law firm in Virginia to file a lawsuit in Florida. The Virginia law firm hired local counsel in Florida and together the law firms settled the lawsuit on behalf of their client, the New Hampshire resident. Later on, the New Hampshire resident sued the two law firms in his home state for malpractice. The First Circuit held that New Hampshire did not have personal jurisdiction over the Virginia and Florida defendants because the defendants had not purposefully availed themselves of the privilege of conducting business in New Hampshire:

> In the case at bar . . . , the contacts of the defendants with New Hampshire were limited, consisting primarily of written and telephone communications with the clients in the state where they happened to live.

> The mere existence of an attorney-client relationship, unaccompanied by other sufficient contacts with the forum, does not confer personal jurisdiction over the non-resident in the forum state; more is required [citing *Burger King*]. In this case, the defendant-attorneys' only connection with New Hampshire was the [plaintiffs'] residence there.

Id. at 1391-92 (citations omitted). The First Circuit went on to address the foreseeability prong of the purposeful availment test and held that nothing in the attorney-client relationship could have alerted the defendants that they might be haled into a New Hampshire court as a result of their representation of the New Hampshire resident. *Id.* at 1393.

The court in *Phillips Exeter* reiterated the teaching of *Sawtelle.* The First Circuit held that the Florida trust fund never reached out to New Hampshire to *create* a relationship, and the trust fund did not benefit in any way from the protections of New Hampshire law when it sent money to New Hampshire, so the trust fund's contacts were not voluntary and personal jurisdiction was not foreseeable. 196 F.3d at 292.

The case at bar cannot be distinguished from *Sawtelle.* Although Daynard formed a relationship with the Mississippi defendants, the relationship did not require the Mississippi defendants to do anything in Massachusetts. The Mississippi defendants might have sent communications to Massachusetts, but the only reason they did so was because Daynard happened to be living there at the time. In other words, nothing the Mississippi defendants did depended on their connection to *Massachusetts;* as in *Sawtelle,* "the defendant – attorneys' only connection

with [Massachusetts] was the [plaintiff's] residence there." 70 F.3d at 1392.

Burger King does not dictate a contrary result. In that case, the defendant opened a Burger King franchise in Michigan after negotiating a twenty-year contract with Burger King's corporate headquarters in Florida. The Supreme Court upheld Florida's assertion of personal jurisdiction over the defendant because the defendant *voluntarily* accepted "the long-term and exacting regulation of his business from Burger King's Miami headquarters." 471 U.S. at 480, 105 S.Ct. 2174. Furthermore, personal jurisdiction in Florida was *foreseeable* because the defendant signed a franchise agreement that specified that Florida law would govern. *Id.* at 482, 105 S.Ct. 2174. In the case at bar, by way of contrast, the Mississippi defendants never submitted to any rules, regulations, or directions emanating from Massachusetts and never agreed to be bound by Massachusetts law.

Daynard cannot meet the purposeful availment requirement. Normally this would end the tripartite analysis because the Court need only consider "reasonableness," as informed by the "gestalt" factors, if Daynard can show *both* relatedness and purposeful availment. *Sawtelle,* 70 F.3d at 1394. Nevertheless, the Court will assume that Daynard can show *just enough* purposeful availment to reach the gestalt factors. There can be little harm in doing so because the reasonableness stage of the jurisdictional calculus evokes a sliding scale: the weaker Daynard's showing on the first two prongs (relatedness and purposeful availment), the less the Mississippi defendants need to show in terms of unreasonableness to defeat jurisdiction, and vice versa. *Id.* Accordingly, "[w]e proceed to consider the gestalt factors, bearing in mind the flimsy

showings of relatedness and purposeful availment made by [Daynard] in this case." *Id.*

(3) Reasonableness: the Gestalt Factors

The third prong of the tripartite analysis looks to five gestalt factors. The following discussion considers them in turn.

1. The Mississippi defendants' burden of appearance: This factor favors jurisdiction. "When, as here, a law firm regularly represents clients outside its home state, we conclude that the burden is neither special nor unusual." *Sawtelle,* 70 F.3d at 1395. *But cf. Ticketmaster-N.Y., Inc. v. Alioto,* 26 F.3d 201, 212 (1st Cir. 1994) (concluding that burden on California resident was so onerous that it would be unreasonable to assert jurisdiction on basis of single defamatory remark in telephone call to Massachusetts).

2. Massachusetts' adjudicatory interest: This factor does not favor jurisdiction. In a tort case, the forum has an interest in enforcing its public policy to protect its domiciliaries, but in a contract case like this one, where the law of the forum likely will not govern, the forum has only a generalized interest in providing a convenient courthouse in which to resolve disputes.

3. Daynard's interest in obtaining convenient relief: This factor favors jurisdiction. "[A] plaintiff's choice of forum must be accorded a degree of deference with respect to the issue of its own convenience. Here, unquestionably, it would be more convenient for [Daynard] to litigate [his] claim in [his] home state rather than elsewhere." *Sawtelle,* 70 F.3d at 1395 (citations omitted).

4. The efficient administration of justice: This factor is a wash. On the one hand, asserting jurisdiction would prevent piecemeal litigation, but on the other hand, there is no indication that any witnesses or evidence will come from this state, other than Daynard himself. *Nowak,* 94 F.3d at 718.

5. Pertinent policy arguments: This factor favors jurisdiction. "Here, the most prominent policy implicated is the ability of a state to provide a convenient forum for its residents to redress injuries inflicted by out-of-forum actors." *Sawtelle,* 70 F.3d at 1395.

The ultimate question to be answered, of course, is whether maintenance of the suit would offend "traditional notions of fair play and substantial justice." *Int'l Shoe,* 326 U.S. at 316, 66 S.Ct. 154. It would. Given that Daynard makes a weak showing of minimum contacts, the mixed gestalt factors are not enough to support personal jurisdiction over the Mississippi defendants.

B. Joint Venture Theory of Personal Jurisdiction

The hearing on May 31, 2001 did not end favorably for Daynard but he had another card up his sleeve: "attributation [sic] to the Scruggs firm of the conduct of their joint venturer here." Hr'g Tr. at 3 [Docket No. 30]. In other words, Daynard argued that the Mississippi defendants were in a joint venture with the South Carolina defendants and thus the minimum contacts of one could be attributed to the other. The Court's curiosity was sufficiently piqued that it granted jurisdictional discovery on the matter, received additional briefing, and scheduled

another hearing. That hearing took place on September 13, 2001.

1. Facts

In his original complaint, Daynard hinted at the idea that the defendants were in a joint venture: "[Mr.] Scruggs acted with express, implied, or apparent authority to represent each of the defendants with regard to both the subject of the meeting [in Chicago, Illinois] and the specific discussions which took place at the meeting." Compl. ¶ 58. Daynard built on this theme in his first affidavit, but it was not until the Court ordered jurisdictional discovery that Daynard was able to unearth direct evidence of a joint venture. Here is what he found.

a. Mississippi Joint Venture

Around October 1994, the Mississippi defendants entered into a "Joint Venture Agreement" with several law firms to pursue litigation on behalf of the State of Mississippi against the tobacco companies. The Mississippi joint venture agreement contains the following relevant provisions:

> 1. *Purpose of Venture.* The objective or purpose for which the Venture is created is to perform the obligation of the Venture created by that certain *Memorandum of Understanding* entered into between certain of the members and the State of Mississippi to pursue litigation against particular members of the tobacco industry on behalf of the State of Mississippi, a copy of which is attached hereto, or any other similar agreement in the manner prescribed by and in accordance with the terms of this Joint Venture Agreement. The

Venture will not engage in any business or devote itself to any objective other than that specified, unless it arises out of or is reasonably incidental thereto.

2. *Venture Name.* The name of the Joint Venture is HEALTH ADVOCATES LITIGATION TEAM JOINT VENTURE and is hereinafter referred to as the "Venture" or "H.A.L.T. Venture" and all assets, agreements and transactions shall be taken, executed and performed in the name of the Venture.

. . . .

5. *Limits of Venture.* Each Member of the Venture shall be free to engage in any other business activity for the Member's exclusive benefit except as such activity shall be in conflict with the terms and purpose of this Agreement. The relationship between the Members shall be limited to performance of the purpose of the Venture in accordance with the terms of this Agreement. This Agreement shall be construed and deemed to create a Joint Venture limited solely to carrying out its purpose. Except as to the relationship created hereby, nothing herein shall be construed to create a general partnership between the Members or to authorize any Attorney to act as general agent for the other Member or to permit any Attorney to negotiate for or to take any other non-Venture related obligations, duties, or liabilities for any other Member.

. . . .

8. *Capital Contributions.* The Venture initially shall be funded by capital contributions from the Members in the total amount of $300,000.00 paid not later than October 15, 1994, in the following percentages:

Member	Capital Contribution Share
a. Barrett/Clark/McTeer	10%
b. Benton/McCormick/Rhoden	15%
c. Lewis	10%
d. Minor	5%
e. [South Carolina defendants]	22.5%
f. Oswald	2.5%
g. Pittman	10%
h. [Mississippi defendants]	25%

Future capital contributions shall be determined by a vote of the Members in accordance with the procedures described in paragraph 11 below. It is anticipated that not less than $300,000.00 will be required for each calendar year of Venture operations.

9. *Profits, Losses, Assets and Liabilities of the Venture.* For purposes of this agreement, the value of the services contributed by each Member of the Venture is deemed to be in proportion to that Member's distributive share of and interest in the income, expenses, profits, gain, loss, deduction, or credit of the Venture. Each Member's distributive share of and interest in the income, expenses, profits, gain, loss, deduction, or credit of the Venture shall be as follows:

Member	Share/Interest
a. Barrett/Clark/McTeer	10%
b. Benton/McCormick/Rhoden	15%
c. Lewis	10%
d. Minor	5%
e. [South Carolina defendants]	21.25%
f. Oswald	5%

g. Pittman 10%
h. [Mississippi defendants] 23.75%

> Payments to Members of profits shall be made from the Venture bank account in the amount and at times as the Members may from time to time direct.
>
> . . . .
>
> 11. *Management.* This case is entirely under the direction and control of Attorney General Mike Moore. Overall management of the Venture is to be accomplished by vote of all of the Members, each Member (or licensed attorney designated by the Member) having a voice equal to that Member's capital interest share in the Venture as described in paragraph 8, above. The Members shall meet from time to time, as required, to act on matters pertaining to the Venture. All decisions, commitments, agreements, undertakings, understandings or other matters purporting to bind the Venture shall be mutually agreed upon by a majority of the Members' voting shares after consultation with all Members . . . .

Mr. Scruggs Dep. Ex. 1.

The South Carolina defendants were invited to sign the Mississippi joint venture agreement but they declined to do so, apparently for tax reasons. Nevertheless, they apparently abided by the joint venture agreement:

> Dear Dickie [Scruggs]:
> As we have discussed several times, we have not signed the Mississippi Joint Venture Agreement solely because we don't want to be governed by Mississippi Tax Law. We are agreeable to all

> terms in the agreement and, as you know, we have acted under the agreement from the beginning. If there is a problem with this please let me hear from you. As I am,
> Sincerely,
> Joseph F. Rice

Id. Ex. 2 (dated Feb. 12, 1997).

Mr. Scruggs and his Mississippi co-venturers "vehemently disagreed" with the letter written by Mr. Rice above. Mr. Scruggs Dep. at 22. Although the South Carolina defendants *worked with* the Mississippi co-venturers as one of the several law firms retained by the State of Mississippi, they never made any capital contributions as required by the Mississippi joint venture agreement. *Id.* at 15-16. "To the best of my knowledge, [the South Carolina defendants] never made a capital contribution to the Mississippi litigation pursuant to this agreement or any other agreement." *Id.* at 16. Instead, the Mississippi and South Carolina defendants paid expenses on their own; Mr. Scruggs estimates that his firm spent millions of dollars and the South Carolina defendants spent even more. *Id.* at 40. Over time, the fact that the South Carolina defendants were working on the Mississippi litigation but were not willing to sign the Mississippi joint venture agreement caused concern among the other co-venturers. *Id.* at 18-19, 21-22. Sometime around 1997, *id.* at 18, the Mississippi and South Carolina defendants apparently agreed between themselves to try to agree at a later date as to sharing the fees:

> We had an understanding – that is Ron Motley and I and Joe Rice of the [South Carolina defendants] had an understanding that at the end of the day, we would sit down and try to agree on a

> division of fees and expenses based on some sort of a quantum meruit basis because none of us could anticipate then what that might be. But it was only an agreement to try to agree. We ultimately did, in 1999, reduce it to an agreement, but we didn't have an agreement other than to negotiate in good faith at that point.

Id. at 17-18.

b. Collaboration in Other States

A list of the counsel for each state in the State Tobacco Litigation shows that the Mississippi defendants were counsel in approximately sixteen of the twenty-three states in which the South Carolina defendants were counsel. Mr. Scruggs Aff. Ex. B [Docket No. 13]; Barshak Aff. ¶ 10 [Docket No. 48]. By the time of the alleged agreement between Mr. Scruggs and Daynard in August 1996, "the bulk of the states" had already retained the defendants to represent the states against the tobacco companies. Mr. Scruggs Dep. at 34. Discovery produced a few of these agreements, which only show that both defendants signed the same agreement at the same time. *See id.* Exs. 8 (Michigan), 9 (Montana), 10-11 (Oklahoma). In the Oklahoma agreement, Mr. Scruggs signed on behalf of Mr. Motley, "after consulting him and getting his approval, of course." *Id.* at 51. "I would say that Ron Motley trusts me and I trust him. . . . " *Id.* at 52.

The defendants apparently held themselves out as a group of gentlemen who had agreed to work together on the various tobacco cases without any written agreement. An example is a letter dated March 13, 1998 from Joseph Rice of the South Carolina defendants to the Attorney General of Hawaii:

> Dear Attorney General Bronster:
> Ness, Motley has an agreement with Richard Scruggs to work jointly on all of the state cases against the Tobacco Industry. We have no formal, written agreement. Ness, Motley and Dick Scruggs have been doing business together for almost ten years and have never had any differences. We fully anticipate sitting down in hindsight and determining what the division of any recoveries would be between the two law firms. There are no written documents I can send you.
> I am sending a copy of this letter to Dick so he may respond likewise, if he has any questions or any additions.
> I hope this satisfies your question. If you think something in writing is necessary, we will be glad to provide it. As I am,
> Sincerely,
> Joseph F. Rice

Id. Ex. 3. Mr. Scruggs characterizes this letter as a "bit of an overstatement." *Id.* at 38. "We were working jointly with [many different] people. . . . We were all working jointly against the tobacco industry, but to the same degree almost that we were with [the South Carolina defendants]." *Id.*

Jurisdictional discovery produced a few other hints that the defendants were treated as a single economic unit, at least for purposes of dividing fees. In correspondence concerning fees from the Florida litigation, the defendants were treated as a single economic unit. *Id.* Exs. 5-6; *see also id.* at 45-47. In correspondence from lawyers in Seattle, the defendants were treated as a single unit for purposes of sharing fees. *See id.* Ex. 7. In agreements with lawyers in Texas, the defendants were referred to collectively as "Ness Motley/Scruggs"; pursuant to that agreement, the

Texas attorneys sent a large check made out to "Ness Motley/Scruggs." *Id.* Exs. 13-15.

Mr. Scruggs described his relationship with the South Carolina defendants as follows:

> They were representing a number of states that we were not involved in. We were representing states they weren't involved in. There was a general cooperative effort between our firms to advance litigation against the tobacco industry . . . . It was a cooperative and graduate sort of relationship where we were all trying to help each other as trial lawyers routinely do around the country when they're concentrating on litigation against a giant corporation.
>
> . . . .
>
> My understanding with [the South Carolina defendants] was always that at the end of the day, we would attempt to negotiate a fee and expense sharing arrangement, each trusting the goodwill of the other to reach a successful negotiation, but without any guarantee that we would. It was always a concern of mine and his that if we were not able to make an agreement that we didn't want an ugly fight over fees, as what has erupted in this case and in other cases.
>
> I think it's unseemly when lawyers sue each other, and I was concerned, as were they, that we might not be able to reach an agreement that would result in a lawsuit. Luckily, in 1999, we did reach such an agreement.

Id. at 19-20, 28-29.

c. Contacts with Daynard

Mr. Scruggs stated in his deposition that he never directed either the Mississippi joint venture or the South Carolina defendants to work with Daynard in Massachusetts. In general, Mr. Scruggs stated that he knew who Daynard was, and might have communicated with him on a few occasions, but he never concerned himself with Daynard, either directly or indirectly:

- He was not aware of Daynard's involvement in the drafting of the Mississippi complaint. *Id.* at 13, 63-64.

- He was not aware of Daynard's efforts to promote his firm. *Id.* at 31, 32, 67.

- The only time he met Daynard in Massachusetts was to give a presentation at a seminar Daynard had organized in late 1995. "There were lots of speakers, and I was one." *Id.* at 53.

- He met with Laurence Tribe once at the Harvard Law School, at Professor Tribe's request, but the meeting was not related to Daynard. *Id.* at 55-56.

- The South Carolina defendants did not have authority to make decisions on behalf of the Mississippi joint venture, nor vice vera. *Id.* at 57.

- The South Carolina defendants did not have mutual control with the Mississippi defendants over all cases associated with the multistate tobacco litigation. *Id.* at 60.

- The South Carolina defendants had no ability to direct or control the Mississippi defendants in states which had not retained both defendants. *Id.* at 60.

- He neither requested nor directed the South Carolina defendants to contact or retain Daynard in Massachusetts. *Id.* at 58-59, 63-64, 67.

- He neither requested nor directed the Mississippi joint venture to contact Daynard in Massachusetts. *Id.* at 59.

- The Mississippi joint venture never directed the South Carolina defendants to contact Daynard in Massachusetts. *Id.* at 60.

The most significant contact between Daynard and Mr. Scruggs occurred in 1997 just before the Mississippi litigation went to trial:

> Daynard asked if I wanted him – more or less, it was put like, Don't you want me to be there to assist you in the trial as a consultant, not as a participant in the actual trial, but as a consultant.
>
> And I said, Well, sure, Dick. If you can make it, that'd be great. We need all the help we could get. If you can come, fine. And then he asked me if I could – he said he was going to have to hire a substitute teacher if he were going to be down there during that part of the summer and would we compensate him for what he would have to pay for that substitute teacher at his law school and we agreed to do that.

Id. at 66.

2. Discussion

The critical issue before the Court is whether it may assert personal jurisdiction over the Mississippi defendants on the basis of the South Carolina defendants' contacts

with Massachusetts. Daynard says the Court may do so because the defendants were in a joint venture. *See, e.g., Hill v. Shell Oil Co.,* 149 F.Supp.2d 416, 418 (N.D.Ill. 2001) ("minimum contacts of one co-venturer are attributable to other co-venturers"). Daynard's argument raises three questions: First, whether the defendants had an agreement between themselves; second, whether that agreement properly can be characterized as a "joint venture"; and third, whether the agreement can serve as the basis for attributing the minimum contacts of one defendant to the other. The third question is most important.

a. Definition of Joint Venture

The parties do not specify what law should be used to determine whether the defendants were in a joint venture, but the Mississippi defendants assume that Mississippi law should apply, as specified in the joint venture agreement itself, Mr. Scruggs Dep. Ex. 1, at 17. That assumption seems fair.[2]

"There is no difference between a partnership and a joint venture except the latter has limited and circumscribed boundaries." *Hults v. Tillman,* 480 So.2d 1134, 1141 (Miss. 1985). Mississippi has no particular test for identifying joint ventures, but this much can be said: First, a joint venture must have been *intended* by the co-venturers. Second, it must be for their mutual benefit with an understanding that they are to share in profits or

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[2] Regardless, the choice of law is irrelevant, according to Daynard, because "[t]he definition is the same in Massachusetts," Pl.'s Opp'n at 3 n. 1 [Docket No. 15].

losses and each is to have a voice in its management. In other words, a condition precedent for its existence is a joint proprietary interest in the enterprise and right of mutual control. *Pittman v. Weber Energy Corp.*, 790 So.2d 823, 826-27 (Miss. 2001).

In the case at bar, there is direct evidence of a single joint venture agreement in Mississippi; there is no direct evidence of joint ventures to pursue litigation in other states or across the nation as a whole. The South Carolina defendants refused to sign the Mississippi joint venture agreement, however, because of the tax consequences, and they also refused to contribute money to its operations. Nevertheless, they apparently abided by its provisions and acted as if they were part of the Mississippi joint venture. Even so, paragraphs five and eleven of the Mississippi agreement make clear that the co-venturers were *not* general agents for each other and did *not* have the power to bind each other without the explicit authorization of the joint venture. Thus, the unilateral actions of the South Carolina defendants could not bind the Mississippi defendants. Indeed, paragraph two of the joint venture agreement required all joint-venture transactions to be performed in the name of the venture, "Health Advocates Litigation Team." In short, the defendants likely were not in a joint venture, as defined by Mississippi law, but even if they were, the co-venturers had very little power to bind each other unilaterally.

b. Personal Jurisdiction Over Collaborators

Whether the defendants were in a joint venture is not dispositive; as stated before, the ultimate question is

whether the Mississippi defendants lie within the reach of the Massachusetts long-arm statute as cabined by the Due Process Clause of the Fourteenth Amendment. Accordingly, the Court must start with the words of the statute:

> A court may exercise personal jurisdiction over a person, who acts directly *or by an agent,* as to a cause of action in law or equity *arising from* the person's
>
> (a) *transacting any business in this commonwealth* [.]

Mass. Gen. Laws ch. 223A, § 3 (emphasis added). The statute recognizes that an out-of-forum defendant may be bound by the inforum contacts of his "agent." *See, e.g., 163 Pleasant St. II,* 987 F.2d at 45. In this respect, Daynard finds support for his attempt to attribute the contacts of the South Carolina defendants to the Mississippi defendants. The question, then, is whether the South Carolina defendants acted as the "agent" of the Mississippi defendants. If the Court were to give the word "agent" its plain meaning, Daynard would lose. As discussed above, the defendants were not in any sort of agency relationship, but rather were in (at best) a dysfunctional joint venture that provided the co-venturers little, if any, mutual control. In Daynard's defense, however, the word "agent" presumably should be interpreted to the limits allowed by the Constitution, *see supra* p. 64, so again the Court will spare Daynard from a strict reading of the statute and instead will proceed to examine the outer bounds of Due Process.

In *Donatelli v. National Hockey League,* 893 F.2d 459 (1st Cir. 1990), the First Circuit considered a fact pattern similar to the case at bar: A disgruntled professional hockey player tried to sue the National Hockey League

("NHL") in Rhode Island. The plaintiff argued that the NHL was subject to personal jurisdiction in Rhode Island because the minimum contacts of one of its teams, the Boston Bruins, could be attributed to the NHL. The NHL resisted this theory of attribution, arguing that it was merely part of an "unincorporated association" in which each team operated independently from the others and the NHL itself operated independently from the teams. A federal judge in Rhode Island asserted personal jurisdiction over the NHL. The First Circuit reversed.

Donatelli, like any case, can be distinguished in various ways, but none of the distinctions is material. First, the opinion concerned an "unincorporated association" rather than a collaboration of law firms. The opinion's analysis, however, goes well beyond the facts of the case and provides a versatile framework by which to judge all attempts to attribute the minimum contacts of one entity to another. Second, the opinion couched its discussion in terms of general jurisdiction rather than specific jurisdiction. The key question before the court, however, was not whether the defendant's contacts were "persistent" or "substantial" – the usual inquiry in cases of general jurisdiction, *see supra* p. 63 – but rather whether the contacts of one entity could be attributed to another – the same question presented in this case by the statute's use of the word "agent." Mindful of these distinctions, but also appreciative of its teachings, the Court turns to *Donatelli* for guidance.

The court in *Donatelli* began by contrasting personal jurisdiction over a parent corporation through a subsidiary from personal jurisdiction over a partnership through a partner. With respect to the former, "[i]n general, the

courts have presumed the institutional independence of parent and subsidiary when determining whether jurisdiction may be asserted over the parent solely on the basis of the subsidiary's contacts with the forum." 893 F.2d at 465. With respect to the latter, "[t]he general rule is that jurisdiction over a partner confers jurisdiction over the partnership." *Id.* at 466. After examining the relationship between the NHL and its teams, the First Circuit concluded that it was neither like a corporation nor like a partnership. Accordingly, the First Circuit created a jurisdictional test suitable for all entities between the extremes of separate incorporation, on the one hand, and partnership, on the other:

> It seems clear that a court must first make a factual determination concerning the extent to which the unincorporated association itself does business in, or has minimum contacts with, the forum. Where, as here, those contacts fall short of the constitutionally required minimum necessary to confer jurisdiction, the court must then ascertain whether one or more members of the association possess the requisite minimum contacts. If the answer is in the negative, the search for general jurisdiction ends. If, however, such contacts exist, the court must proceed to assess the extent of control, if any, exercised by the association over its members (and in particular, over the member whose contacts the plaintiff wishes to attribute to the association). As a subset of this inquiry, the court should assay the extent to which the member acts for, is an agent of, or is synonymous with, the association. The barometer for control, we think, is whether or not the association exercised substantial influence

> over the member's decision to carry on the in-forum activities which constitute the relevant "minimum contacts."

Our emphasis on control stems from a belief that the test for attribution should be a practical one. Absent a showing that the association had substantial influence over the member's decision to conduct activities in the forum, then it seems unfair to consider attributing the member's activities to the association; the "constitutional touchstone" of personal jurisdiction, after all, is whether the defendant "purposefully established 'minimum contacts' in the forum State." Unless such a showing can be made, ascribing the member's contacts to the association would be tantamount to haling the association into the forum solely as a result of attenuated third-party contacts or activities for which the association was not responsible. Personal jurisdiction cannot be hung on so fragile a hook. Because constitutional limitations upon a state's power to assert personal jurisdiction ultimately hinge upon concepts of accountability and responsibility, it would be irrational to allow courts to assert jurisdiction over an unaccountable party for the purpose of determining whether the party is indeed accountable.

> The methodology has one last step. If the plaintiff cannot show that the association substantially influenced the decisionmaking leading to the member's in-forum activities, there can be no attribution. If, however, it can be demonstrated that the association had substantial influence over such decisionmaking, the court must determine whether, given the attribution and the "minimum contacts" which travel with it, the secondary criteria (*e.g.*, notice, predictability, foreseeability, purposeful availment, reciprocity,

> and the other Gestalt factors) render it equitable, or inequitable, to bring the unincorporated association before the forum court.

Id. at 468-69 (footnotes and citations omitted).

Donatelli emphasizes that "[t]he barometer for control . . . is whether or not the association exercised substantial influence over the member's decision to carry on the in-forum activities which constitute the relevant 'minimum contacts.'" *Id.* at 469. In the context of the case at bar, the inquiry is whether the Mississippi defendants (i) had any control over the South Carolina defendants' contacts with Massachusetts or (ii) had agreed to be bound by the South Carolina defendants' actions. Neither was the case. Both the language of the Mississippi joint venture agreement and the realities of the relationship between the defendants fail to meet the "substantial influence" test of *Donatelli*. The defendants worked with the common goal of making money, but they did not exercise "substantial influence" over each other in pursuit of that goal, either in the Mississippi litigation or in the other cases across the country in which they collaborated.

In sum, Daynard cannot make a prima facie showing of personal jurisdiction over the Mississippi defendants, either directly or by attribution. If only direct contacts are considered, the Mississippi defendants did not transact any business in Massachusetts as required by the long-arm statute, or if they did, there was no purposeful availment as required by Due Process. If attribution is considered, the South Carolina defendants were not the "agent" of the Mississippi defendants, or if they were, there was no substantial influence as required by Due Process. Either way, the Court cannot assert personal jurisdiction over the Mississippi defendants.

III. SOUTH CAROLINA DEFENDANTS

The Court dismissed the Mississippi defendants at the hearing held on September 13, 2001, and soon after entered partial judgment in their favor, Fed. R. Civ. P. 54(b), so that Daynard immediately could appeal the Court's ruling. With the Mississippi defendants out of the picture, the South Carolina defendants soon moved (i) to dismiss the case in its entirety for failure to join an indispensable party, Fed. R. Civ. P. 12(b)(7), or, in the alternative, (ii) to transfer the case to Mississippi, 28 U.S.C. § 1404(a), where a court would have personal jurisdiction over both defendants. The Court heard the South Carolina defendants' motion on November 14, 2001.

A. Failure to Join an Indispensable Party

The South Carolina defendants argue that the case should not proceed without the Mississippi defendants because it was *Mr. Scruggs* who allegedly shook hands with Daynard in Chicago, so any lawsuit without Mr. Scruggs would be incomplete and only spawn subsequent lawsuits that *do* include Mr. Scruggs. Daynard, in response, argues that the handshake in Chicago was merely the culmination of many assurances from *both* the South Carolina defendants and the Mississippi defendants that he would receive attorneys' fees. Daynard Aff. ¶ 4 [Docket No. 33]; Compl. ¶¶ 53-57. In other words, Daynard argues that the defendants *together* agreed to pay him 5% of their attorneys' fees from the State Tobacco Litigation, so under a theory of joint and several liability, only one defendant need be named in the complaint.

1. Procedural Posture

A defense of failure to join an indispensable party, Fed. R. Civ. P. 12(b)(7), may be made at any time before the end of trial. Fed. R. Civ. P. 12(h)(2). The defense turns on Rule 19, which implicitly distinguishes "necessary" parties from "indispensable" parties. A "necessary" party under Rule 19(a) is one that *should* be joined to effect a just adjudication, while an "indispensable" party under Rule 19(b) is simply a "necessary" party under Rule 19(a) who, for one reason or another, cannot be made a party *and* without whom the court determines the action cannot proceed. The important point to note is that "indispensable" is a subset of "necessary," not a mutually exclusive category.

Thus, determination of whether a party is "indispensable" requires two steps: First, is the party "necessary" under Rule 19(a)? Second, if the party is "necessary," is it also "indispensable" under Rule 19(b)? *E.g., United States v. San Juan Bay Marina,* 239 F.3d 400, 405 (1st Cir. 2001). The First Circuit will review this Court's determination under Rule 19(b) for an abuse of discretion, *id.* at 403, but the First Circuit has not announced a standard of review for Rule 19(a), *id.* The First Circuit's reluctance to take a stand is understandable given the utter confusion among the circuits on the issue. *See Nat'l Union Fire Ins. Co. v. Rite Aid of S.C., Inc.,* 210 F.3d 246, 250 n. 7 (4th Cir. 2000) (noting confusion). If it mattered, the First Circuit has hinted that it "would be inclined to apply an abuse of discretion standard to such application-of-law decisions under Rule 19(a)." *Tell v. Trs. of Dartmouth Coll.,* 145 F.3d 417, 418-19 (1st Cir. 1998).

As the moving party, the South Carolina defendants bear the burden of showing why the Mississippi defendants are indispensable and dismissal is proper under Rule 12(b)(7). *Lenon v. St. Paul Mercury Ins. Co.*, 136 F.3d 1365, 1372 (10th Cir. 1998); *Raytheon Co. v. Continental Cas. Co.*, 123 F.Supp.2d 22, 32 (D.Mass. 2000) (Saris, J.). "In meeting its burden, the moving party may present, and the court may consider, evidence outside of the pleadings." *Id.* at 32; 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1359, at 426-27 (2d ed. 1990); *cf.* Fed. R. Civ. P. 19 advisory committee's note (1966 amendment) (noting decision may "properly be deferred if adequate information is not available at the time").

2. Discussion

a. Rule 19(a) – "Necessary"?

A party is "necessary"

> if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a).

(1) Some Rules of Thumb

Over the years, several rules of thumb have developed under Rule 19:

> • Joint tortfeasors are not necessary parties. Thus, by definition, they may not be indispensable.
>
> • Co-obligors [to a contract] may be necessary parties, but generally are not indispensable.
>
> • As a general rule, an action to set aside a contract requires the joinder of all parties to the contract.

4 *Moore's Federal Practice* § 19.06 (3d ed. 2001) (citations and footnotes omitted). These rules of thumb correspond to the holdings in three Supreme Court cases: *Temple v. Synthes Corp.,* 498 U.S. 5, 7, 111 S.Ct. 315, 112 L.Ed.2d 263 (1990) (per curiam), *Camp v. Gress,* 250 U.S. 308, 317, 39 S.Ct. 478, 63 L.Ed. 997 (1919), and *Shields v. Barrow,* 58 U.S. 130, 17 How. 130, 140, 15 L.Ed. 158 (1854). For the cognate Massachusetts rule, *see* Mass. R. Civ. P. 19(a), Reporters Notes – 1973; *Thomas v. Benson,* 264 Mass. 555, 556- 57, 163 N.E. 181 (1928) (in contract action, joint obligees are indispensable; joint obligors are only conditionally necessary); William G. Young, *Civil Procedure in the Courts of the Commonwealth of Massachusetts* C.P.-23 to -26 (Mass. Continuing Legal Educ. 1978) (same).

The South Carolina defendants cite several decisions for the proposition that, generally speaking, all parties to a contract must be joined.[3] Defs.' Mem. at 4 [Docket No.

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[3] *E.g., Rivera Rojas v. Loewen Group Int'l, Inc.,* 178 F.R.D. 356, 362 (D.P.R. 1998) ("A contracting party is the paradigmatic example of an

(Continued on following page)

66]. The South Carolina defendants apparently advocate a rule of thumb in contravention to the rules of thumb recognized by the Supreme Court and the commentators, but regardless, "the proper approach today is to examine each case in light of the factors mentioned in Rules 19(a) and 19(b)." 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1613, at 176 (3d ed. 2001).

The most lucid opinion applying Rule 19 to a contract action is *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399 (3d Cir. 1993), *rev'g* No. 92-1581, 1993 WL 4165 (E.D.Pa. Jan. 5, 1993). The court carefully considered each of the factors listed in Rule 19(a) and held that the absent defendant – a co-obligor to the alleged contract and the parent corporation of the named defendant – was not even "necessary," much less "indispensable." *Janney* considered, and partially rejected, arguments based on a line of cases from the First Circuit. Those cases are *Pujol v. Shearson/American Express, Inc.*, 877 F.2d 132 (1st Cir. 1989); *H.D. Corp. v. Ford Motor Co.*, 791 F.2d 987 (1st Cir. 1986); and *Acton Co. v. Bachman Foods, Inc.*, 668 F.2d 76 (1st Cir. 1982). Before turning to *Janney* and the parties' arguments, the Court will examine *Acton, H.D. Corp.*, and *Pujol*.

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indispensable party."); *Rashid v. Kite*, 957 F.Supp. 70, 74 (E.D.Pa. 1997) ("Generally, in breach of contract actions, all parties to the contract should be joined."); *Travelers Indem. Co. v. Household Int'l, Inc.*, 775 F.Supp. 518, 527 (D.Conn. 1991) ("[P]recedent supports the proposition that a contracting party is the paradigm of an indispensable party.").

(2) First Circuit Caselaw

In *Acton,* the First Circuit affirmed the dismissal of a contract action for failure to join an indispensable party. The facts are as follows: A parent corporation and its subsidiary agreed to purchase the assets of another company. When the deal fell through, two lawsuits arose: (i) the seller sued both the parent and the sub in New York state court for breach of contract, and (ii) the sub – without joining the parent – sued the seller in the District of Massachusetts seeking a declaration that the contract was void as a result of the seller's misrepresentations. The district court dismissed the sub's lawsuit for failure to join the parent. The First Circuit affirmed:

> There is little doubt that [the parent], as a party to the letter of intent and to the purchase agreement, should be joined to this action if feasible. . . . To begin, [the parent] played a substantial role in negotiating both agreements; indeed, [the sub] did not even exist in April 1979 when the letter of intent was signed. Thus [the parent] may have rights under this preliminary agreement not shared by [the sub]. Moreover, according to the express terms of the purchase agreement, [the parent] and not [the sub] would be entitled to refund of the $250,000 deposit. Unless [the parent] were bound by the results of [the sub's] suit, it would remain free to commence a new action on its claims. [The parent's] presence is therefore desirable not only to avoid piecemeal and duplicative litigation, but also to provide complete relief to the [seller]. *See* Rule 19(a)(1).
>
> In addition, [the parent], as [the sub's] parent corporation and as [the sub's] guarantor, might be bound by [the sub's] suit under the doctrine that res judicata applies not only to the actual

> parties but also to those in privity with the parties. If so, to proceed in [the parent's] absence might impair [the parent's] interest in the controversy very significantly. Even if [the parent] would not be legally bound, an adverse ruling would be a persuasive precedent in a subsequent proceeding, and would weaken [the parent's] bargaining position for settlement purposes. In either case, to proceed without [the parent] might "as a practical matter impair or impede" [the parent's] ability to protect its interest in this matter. Rule 19(a)(2)(i). [The parent] is therefore a ["necessary" party].

668 F.2d at 78-79 (citations omitted). The facts of *Acton* are distinguishable from the case at bar in two notable respects: (i) the absent party in *Acton* was a co-obligee, not a co-obligor, and (ii) any judgment in *Acton* likely would have been binding against the absent defendant because it was in privity with the co-obligee.

In *H.D. Corp.*, several automobile dealerships brought a breach of contract action in the District of Puerto Rico against Ford Motor Company and its local subsidiary. The dealerships and Ford were all Delaware corporations, so the district court dismissed Ford from the action to preserve diversity, leaving only its local subsidiary as a defendant. The district court went on to dismiss the action entirely, however, because it concluded that Ford was an indispensable party. The First Circuit affirmed. The holding of *H.D. Corp.* is not instructive, though, for two reasons. First, the court held that Ford was "indispensable" without considering whether it was "necessary." 791 F.2d at 992-93. Second, given the case-specific inquiry required by Rule 19(b), an opinion affirming a finding that

a party is "indispensable" does not provide useful guidance far beyond its particular facts.

Finally, in *Pujol,* the First Circuit noted with approval the distinction traditionally drawn between joint tortfeasors and persons jointly liable on a contract:

> [I]f one thing is clear in respect to Rule 19, it is that, unlike a person vicariously liable in tort, a person potentially liable as a joint tortfeasor is *not* a necessary or indispensable party, but merely a permissive party subject to joinder under Rule 20. . . .
>
> Of course, one might wonder why Rule 19 would treat "joint tortfeasors" differently in this respect than, say, persons jointly liable under a contract. *See Acton,* 668 F.2d at 81-82 ("an action seeking rescission of a contract must be dismissed unless all parties to the contract, and others having a substantial interest in it, can be joined"); *see also H.D. Corp.,* 791 F.2d at 993. The reason for the difference may lie in the history of joinder doctrine, or it may reflect a compromise between the interests served by Rule 19 and the policies of tort law. But, regardless of the reasons, this case presents no basis for ignoring such well established precedent [concerning jointly and severally liable tortfeasors].

877 F.2d at 137 (citations omitted). The quotation above, however, is dictum and adds nothing to the holdings of *Acton* and *H.D. Corp.*

(3) *Janney*

In *Janney,* an investment bank agreed to be the exclusive advisor to a parent corporation and its subsidiaries.

Later, the investment bank sued one of the subs – but not the parent – for failing to pay the fees contemplated by the agreement. Both the parent and the sub were co-obligors, but only the parent had signed the contract. The Third Circuit carefully analyzed each provision of Rule 19(a) and concluded that the parent was not a "necessary" party:

Rule 19(a)(1) – "in the person's absence complete relief cannot be accorded among those already parties." The court held that this factor did not apply because the defendants could be jointly and severally liable under the contract. 11 F.3d at 405-06. The court noted that it was possible that the contract, in fact, did not impose joint and several liability on the defendants, but the court held that all inferences had to be drawn in the plaintiff's favor on a motion to dismiss, so the court assumed joint and several liability. *Id.* at 406.

Rule 19(a)(2)(i) – "the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may as a practical matter impair or impede the person's ability to protect that interest." The court held that this factor did not apply because any judgment against the defendants would not *bind* the absent defendant. 11 F.3d at 406-11. The court also rejected the argument that any such judgment would nevertheless act as "persuasive precedent" and thus impair the absent defendant's ability to protect its interests:

> We are not sure what the district court means by the phrase "persuasive precedent." To the extent it involves the doctrine of *stare decisis,* we are not inclined to hold that any potential effect the doctrine may have on an absent party's rights makes the absent party's joinder compulsory under Rule

19(a) whenever "feasible." Such a holding would greatly expand the class of "necessary" or compulsory parties Rule 19(a) creates. Moreover, to whatever extent the rule's phrase "as a practical matter impair or impede" has broader meaning than that given by principles of issue preclusion, we think the effect of the federal decision must be more direct and immediate than the effect a judgment in [the defendant's] favor would have on [the absent defendant] here. They are, after all, separate corporate entities. In any event, we do not believe any possibility of a "persuasive precedent" requires joinder under subsection 19(a)(2)(i).

. . . .

. . . [The defendant] cites [*Acton Co. v. Bachman Foods, Inc.*, 668 F.2d 76 (1st Cir. 1982)] to support its argument that the potentially persuasive effect of the federal action on any related litigation justifies the district court's conclusion that the absent party's joinder is compulsory under Rule 19(a)(2)(i). That argument ignores the United States Court of Appeals for the First Circuit's refusal to adopt a persuasive precedent standard for a Rule 19(a) determination that all tortfeasors who could be jointly and severally liable should be joined if feasible. *See Pujol v. Shearson/American Express, Inc.*, 877 F.2d 132, 136 (1st Cir. 1989) ("The mere fact, however, that Party A, in a suit against Party B, intends to introduce evidence that will indicate that a nonparty, C, behaved improperly does not, by itself, make C a necessary party."). Though we recognize that the *Pujol* court distinguished joint tortfeasors from joint obligors and stated that *Acton* was still good law as applied to contract liability,

id. at 137, we see no logical distinction that would justify treating contract actions differently than tort actions for purposes of compulsory joinder. Instead, we believe the distinction made by the Court of Appeals for the First Circuit is based on authority, not logic. Thus, to the extent *Pujol* goes beyond a panel's recognition of the need to accept controlling circuit precedent, it does not persuade us. For the reasons already stated, we hold instead that [the absent defendant], a co-obligor, is not a party whose joinder Rule 19(a)(2)(i) requires because continuation of the federal litigation in [a co-obligor's] absence will not create a precedent that might persuade another court to rule against [the co-obligor] on principles of *stare decisis,* or some other unidentified basis not encompassed by the rules of collateral estoppel or issue preclusion.

We do not ignore the *Acton* court's suggestion that joinder of an absent party is compulsory under Rule 19(a)(2)(i) if the federal litigation would have a preclusive effect against the absent party in subsequent state litigation. *Acton,* 668 F.2d at 78. Indeed, we agree. If issue preclusion or collateral estoppel could be invoked against [the absent defendant] in other litigation, continuation of the federal action could "as a practical matter impair or impede" [the absent defendant's] interests and so Rule 19(a)(2)(i) would require its joinder if joinder were feasible. Fed. R. Civ. P. 19(a)(2)(i). In the case before us, however, this argument lacks force. Mere presentation of an argument that issue preclusion is possible is not enough to trigger Rule 19(a)(2)(i). Rather, it must be shown that some outcome of the federal case that is reasonably likely can preclude the absent party with respect to an issue material to the absent party's

> rights or duties under standard principles governing the effect of prior judgments. If impairment of the absent party's interest is not shown in that sense, the adequacy of [the defendant's] representation of [the absent defendant's] interest is not material. [The defendant's] assumption that any potential for issue preclusion compels a holding that a party is necessary under Rule 19(a)(2)(i) cannot be accepted.

Id. at 407, 408-09 (citations and footnotes omitted).

Rule 19(a)(2)(ii) – "the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." The court held that this factor did not apply because the risk of inconsistent *adjudications* is not the same thing as inconsistent *obligations*.[4] 11 F.3d at 411-13.

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[4] The First Circuit recently reiterated this distinction:

> "Inconsistent obligations" are not, however, the same as inconsistent adjudications or results. Inconsistent obligations occur when a party is unable to comply with one court's order without breaching another court's order concerning the same incident. Inconsistent adjudications or results, by contrast, occur when a defendant successfully defends a claim in one forum, yet loses on another claim arising from the same incident in another forum. Unlike a risk of inconsistent obligations, a risk that a defendant who has successfully defended against a party may be found liable to another party in a subsequent action arising from the same incident – i.e., a risk of inconsistent adjudications or results – does not necessitate joinder of all of the parties into one action pursuant to Fed. R. Civ. P. 19(a). Moreover, where

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> The possibility that [the defendant] may bear the whole loss if it is found liable [and the absent defendant later is found *not* liable] is not the equivalent of double liability. It is instead a common result of joint and several liability and should not be equated with prejudice. Inherent in the concept of joint and several liability is the right of a plaintiff to satisfy its whole judgment by execution against any one of the multiple defendants who are liable to him, thereby forcing the debtor who has paid the whole debt to protect itself by an action for contribution against the other joint obligors.

Id. at 412.

Thus, the Court in *Janney* held that the absent co-obligor was not even a "necessary" party under Rule 19(a), let alone an "indispensable" party under Rule 19(b).

(4) The Parties' Arguments

First, pointing to subsection (a)(1), the South Carolina defendants argue that Daynard cannot get complete relief in this Court because he will not be able to recover the money owed by the Mississippi defendants. Defs.' Mem. at 6 n.2. This argument assumes that Daynard entered into separate contracts with the South Carolina and Mississippi defendants, an assumption the Court cannot make

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> two suits arising from the same incident involve different causes of action, defendants are not faced with the potential for double liability because separate suits have different consequences and different measures of damages.

Delgado v. Plaza Las Americas, Inc., 139 F.3d 1, 3 (1st Cir. 1998) (per curiam) (citations omitted), *vacating* 173 F.R.D. 30 (D.P.R. 1997).

on a motion to dismiss. To the contrary, the South Carolina defendants bear the burden of persuasion, so the Court must draw inferences in Daynard's favor and assume that the defendants are jointly and severally liable.

Second, pointing to subsection (a)(2)(i), the South Carolina defendants argue that because they likely will pursue the "empty chair" defense – in particular, that Daynard made a contract *only* with Mr. Scruggs – a judgment in favor of the South Carolina defendants would be "persuasive precedent" against the Mississippi defendants, thus impairing the Mississippi defendants' ability to defend themselves as a practical matter. Defs.' Mem. at 5-6 & n. 1. As discussed above, *supra* pp. 82 - 83, both the First Circuit and *Janney* have rejected this very argument, and so must this Court.[5]

Third, pointing to subsection (a)(2)(ii), the South Carolina defendants argue that there is the possibility that they *alone* will end up footing the entire bill when, in fact, the Mississippi defendants are entirely or partly responsible. Defs.' Mem. at 6. As discussed above, *supra* pp. 82 - 83, both the First Circuit and *Janney* have rejected this very argument, and so must this Court.

Fourth, recognizing the traditional rule of thumb that co-obligees are "indispensable" parties while co-obligors

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[5] Similarly, the Mississippi defendants cannot be "necessary" merely because the South Carolina defendants need to obtain evidence from them. *E.g., Johnson v. Smithsonian Inst.*, 189 F.3d 180, 188-89 (2d Cir. 1999) (citing *Costello Publ'g Co. v. Rotelle*, 670 F.2d 1035, 1044-45 (D.C.Cir. 1981)).

might not even be "necessary," the South Carolina defendants try to cast themselves as co-obligees under the alleged contract. Defs.' Reply at 6 [Docket No. 76]. In other words, the South Carolina defendants argue that Daynard still owes legal research and advice to the defendants – even though the State Tobacco Litigation settled years ago. This argument is as silly as it is belated. The only question before the Court is whether the defendants owe Daynard money; there has never been any suggestion that Daynard still owes services to the defendants. The Court rejects the notion that the South Carolina defendants are co-obligees and instead recognizes them for what they really are – co-obligors.

Finally, recognizing the traditional rule of thumb that an action to set aside a contract requires the joinder of all parties to the contract, the South Carolina defendants argue that a mutual release to which Daynard allegedly agreed puts the validity and enforceability of the alleged contract into question and thus requires joinder of all parties to the alleged contract. Defs.' Reply at 5 (citing *Vedder Price Kaufman & Kammholz v. First Dynasty Mines, Ltd.*, No. 01-3970, 2001 WL 1190996 (S.D.N.Y. Oct. 9, 2001)). This argument twists the traditional rule of thumb, which is that an action *in equity* to determine the *rights* under a contract requires joinder of all the parties to the contract. The case at bar concerns only money damages (legal relief) and does not concern rescission or specific performance (equitable relief). Accordingly, the traditional rule of thumb that rescission requires joinder of all parties must give way to the traditional rule of thumb that a plaintiff need not name all co-obligors as defendants.

In short, the Court holds that it is not *necessary* for Daynard to join the Mississippi defendants in this action because they are (or, drawing inferences in Daynard's favor, could be) jointly and severally liable co-obligors.

(b) Rule 19(b) – "Indispensable"?

If the Mississippi defendants are not "necessary" under Rule 19(a), then by definition they cannot be "indispensable" under Rule 19(b). Nevertheless, the Court will consider the South Carolina defendants' arguments under Rule 19(b) for the sake of completeness.

If a "necessary" party cannot be joined (*e.g.*, because of a lack of personal jurisdiction), "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Fed. R. Civ. P. 19(b). The factors to be considered by the court include:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id. The Supreme Court has identified four corresponding interests a court might want to consider:

> (1) the interest of the outsider whom it would have been desirable to join; (2) the defendant's

> interest in avoiding multiple litigation, inconsistent relief, or sole responsibility for a liability it shares with another; (3) the interest of the courts and the public in complete, consistent, and efficient settlement of controversies; and (4) the plaintiff's interest in having a forum.

H.D. Corp., 791 F.2d at 992 (citing *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108-11, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968)).

As mentioned before, the First Circuit will review this Court's determination under Rule 19(b) for an abuse of discretion. Accordingly, precedent provides little guidance. "Whether a person is 'indispensable,' that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation." *Provident Tradesmens*, 390 U.S. at 118, 88 S.Ct. 733. With this in mind, the Court turns to the four factors enumerated in Rule 19(b), which substantially overlap with the factors enumerated in Rule 19(a).

First, to what extent might a judgment rendered in the person's absence be prejudicial to the person or those already parties? This factor tends to favor Daynard. The South Carolina defendants argue that (i) there is the possibility that they *alone* will end up footing the entire bill, which would prejudice them; (ii) there is the possibility that a successful "empty chair" defense would result in "persuasive precedent," which would prejudice the Mississippi defendants; and (iii) there is the possibility of an inconsistent adjudication in a later lawsuit, which could prejudice any of the parties. Defs.' Mem. at 9-10; Defs.' Reply at 6-8. The Court rejects these arguments for the same reasons given before, namely (i) joint and several liability by definition includes the possibility that one

defendant ends up footing the entire bill, (ii) "persuasive precedent" alone cannot, as a practical matter, impair or impede the Mississippi defendants' ability to defend themselves, and (iii) Rule 19 is concerned with the risk of inconsistent *obligations,* not inconsistent *adjudications. See supra* pp. 82-83.

Second, to what extent can the prejudice be lessened or avoided by protective provisions in the judgment, by the shaping of relief, or other measures? This factor does not seem relevant to this dispute. According to the advisory committee's note, "protective provisions" includes requiring a defendant to set aside money in case absent plaintiffs later obtain judgments, and the "shaping of relief" includes awarding money damages in lieu of specific performance where the latter might affect an absentee adversely.

Third, would a judgment rendered in the person's absence be adequate? This factor clearly favors Daynard. The South Carolina defendants are (or, drawing inferences in Daynard's favor, could be) jointly and severally liable. The South Carolina defendants complain that allowing Daynard to obtain complete relief from them will result in a second lawsuit between the defendants, Defs.' Mem. at 12, but that is their problem, not Daynard's. Obviously a single lawsuit would be more efficient than multiple lawsuits, but this factor only concerns whether the judgment would be adequate to Daynard.

Fourth, would the plaintiff have an adequate remedy if the action is dismissed for nonjoinder? This factor clearly favors the South Carolina defendants. Daynard could bring suit against all the defendants in Mississippi.

In sum, the first and third factors favor Daynard, the second factor is not relevant, and the fourth factor favors the South Carolina defendants. The question is not simply how many factors point in one direction, of course, but "whether in equity and good conscience the action should proceed among the parties before [the court], or should be dismissed, the absent person being thus regarded as indispensable." Fed. R. Civ. P. 19(b). To this question the Court answers that it would allow the action to proceed against the South Carolina defendants even if the Mississippi defendants properly were regarded as "necessary" parties.

B. Change of Venue

In the alternative, the South Carolina defendants ask the Court to transfer this case to the Southern District of Mississippi in Biloxi, where Daynard properly could have filed his complaint in the first place and where personal jurisdiction over the defendants would not be a problem.

1. Procedural Posture

A defense of *improper* venue, Fed. R. Civ. P. 12(b)(3); *see also* 28 U.S.C. § 1406(a), is waived if neither made by motion under Rule 12 nor included in a responsive pleading. Fed. R. Civ. P. 12(h)(1). A motion to *change* venue, 28 U.S.C. § 1404(a), on the other hand, need not be made at the first opportunity, although a party should not tarry in bringing such a motion. 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3844, at 334-37 & nn. 15-19 (2d ed. 1986). The South Carolina defendants' have moved to *change* venue pursuant to section 1404(a).

2. 28 U.S.C. § 1404(a)

Section 1404(a) provides:

> § 1404. *Change of venue*
>
> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1404(a).[6]

Section 1404(a) displaces the common-law doctrine of forum non conveniens when the transfer is within the federal court system. "[A]lthough [section 1404(a)] was drafted in accordance with the doctrine of *forum non conveniens,* it was intended to be a revision rather than a codification[7] of the common law." *Piper Aircraft Co. v.*

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[6] Title 28 contains two other transfer provisions: section 1406(a), which allows transfer when venue is "wrong," and section 1631, which allows transfer when "jurisdiction" is lacking. The circuits are hopelessly split on which of the three transfer provisions applies when the basis for transfer is a lack of personal jurisdiction, *see* 17 *Moore's Federal Practice* § 111.02[1][b][ii][B] (3d ed. 2001); *see also Bearse v. Main St. Invs.*, 170 F.Supp.2d 107, 115-17 (D.Mass. 2001) (Collings, Mag.) (holding that only section 1406 applies, given *Albion v. YMCA Camp Letts,* 171 F.3d 1, 2 (1st Cir. 1999) (rejecting application of 1404(a)), and *Pedzewick v. Foe,* 963 F.Supp. 48, 50 (D.Mass. 1997) (rejecting application of section 1631)), but the Court need not tackle this problem today because the South Carolina defendants, not the Mississippi defendants, filed the motion presently under consideration.

[7] *Contra Albion v. YMCA Camp Letts,* 171 F.3d 1, 2 (1st Cir. 1999) (citing *Pedzewick v. Foe,* 963 F.Supp. 48, 50 n. 1 (D.Mass. 1997) (dictum)); *Pike v. Clinton Fishpacking, Inc.,* 143 F.Supp.2d 162, 171 (D.Mass. 2001) (Lindsay, J.) (quoting *Albion*); *Veryfine Prods., Inc. v. Phlo Corp.,* 124 F.Supp.2d 16, 21 (D.Mass. 2000) (same); *GSI Lumonics, Inc. v. BioDiscovery, Inc.,* 112 F.Supp.2d 99, 104 (D.Mass. 2000) (same).

Reyno, 454 U.S. 235, 253, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981) (citations omitted). "The harshest result of the application of the old doctrine of forum non conveniens, dismissal of the action, was eliminated by the provision in § 1404(a) for transfer. . . . As a consequence, we believe that Congress . . . intended to permit courts to grant transfers upon a lesser showing of inconvenience.[8] This is not to say that the relevant factors[9] have changed or that the plaintiff's choice of forum is not to be considered, but

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[8] *But see, e.g., Pike v. Clinton Fishpacking, Inc.,* 143 F.Supp.2d 162, 171 & n. 3 (D.Mass. 2001) (Lindsay, J.) (conflating section 1404(a) and forum non conveniens); *Veryfine Prods., Inc. v. Phlo Corp.,* 124 F.Supp.2d 16, 21-22 (D.Mass. 2000) (same); *GSI Lumonics, Inc. v. BioDiscovery, Inc.,* 112 F.Supp.2d 99, 104-05 (D.Mass. 2000) (same).

[9] Under the doctrine of forum non conveniens, a court may consider various "private interest factors" and various "public interest factors." Private interest factors that may be considered include the relative ease of access to sources of proof; the availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; the possibility of a view of the premises, if a view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive. Public interest factors that may be considered include the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty. *Piper,* 454 U.S. at 241 n. 6, 102 S.Ct. 252 (citing *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508-09, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)). The "interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action" might not be an appropriate consideration anymore. *Compare Ferens v. John Deere Co.,* 494 U.S. 516, 529-30, 110 S.Ct. 1274, 108 L.Ed.2d 443 (1990) (quoting all public interest factors with approval), *with Salve Regina College v. Russell,* 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) (reversing court of appeals for deferring to district court's determination of state law).

only that the discretion to be exercised is broader." *Norwood v. Kirkpatrick,* 349 U.S. 29, 32, 75 S.Ct. 544, 99 L.Ed. 789 (1955).

There is a strong presumption in favor of the plaintiff's choice of forum, *e.g., Coady v. Ashcraft & Gerel,* 223 F.3d 1, 11 (1st Cir. 2000), and the presumption is even stronger when the plaintiff resides in the chosen forum, *Kleinerman v. Luxtron Corp.,* 107 F.Supp.2d 122, 125 (D.Mass. 2000) (Gorton, J.). The burden of proof rests with the party seeking transfer, and a district court's decision under section 1404(a) will be reviewed for an abuse of discretion. *Coady,* 223 F.3d at 11. A court may only transfer an action under section 1404(a) to a district in which the plaintiff properly could have filed his complaint in the first place. *Hoffman v. Blaski,* 363 U.S. 335, 80 S.Ct. 1084, 4 L.Ed.2d 1254 (1960). If a court allows a motion to transfer under section 1404(a), the transferee court must apply the law of the transferor court, *Van Dusen v. Barrack,* 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964), even if it was the plaintiff who requested the transfer, *Ferens v. John Deere Co.,* 494 U.S. 516, 110 S.Ct. 1274, 108 L.Ed.2d 443 (1990).

Section 1404(a) advises a court to consider "the convenience of parties and witnesses" (private interests) and "the interest of justice" (public interests). The statute does not specify any particular factors to consider, but the case law does. As already mentioned, the plaintiff's choice of forum is the most important factor to consider. Beyond that, different cases emphasize different factors as important to the transfer calculus. Some cases have stated that "trial efficiency" is a paramount concern. *JMTR Enters., LLC v. Duchin,* 42 F.Supp.2d 87, 99-100 (D.Mass. 1999) (citing *Coady v. Ashcraft & Gerel,* 996 F.Supp. 95, 101

(D.Mass. 1998), *rev'd,* 223 F.3d 1, 11 (1st Cir. 2000)). Others have found the relative financial positions of the parties to be important. *Sigros v. Walt Disney World Co.,* 129 F.Supp.2d 56, 71 (D.Mass. 2001) (Gorton, J.); *Kleinerman,* 107 F.Supp.2d at 125. Many have found the convenience of the witnesses to be most important. *E.g., Home Prods. Int'l-N. Am., Inc. v. PeopleSoft USA, Inc.,* 201 F.R.D. 42, 48 (D.Mass. 2001) (Keeton, J.); *Princess House, Inc. v. Lindsey,* 136 F.R.D. 16, 18 (D.Mass. 1991) (Bowler, Mag.). The list could go on.[10] In short, any number of private and public interests might inform the decision whether to change venue.

3. Discussion

Daynard challenges the motion to transfer head on; he does not challenge the timing of the motion or the proposed destination. Daynard simply argues that he is

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[10] "While there is no definitive list of factors that must be considered, courts typically look to some or all of the following 'public' 'and private' interest factors to determine whether the proposed alternative forum would better serve the convenience and interest of justice requirements:" (i) the plaintiff's original choice of forum, (ii) where the events at issue in the lawsuit took place, (iii) the convenience of the parties, (iv) the convenience of the witnesses, (v) the comparative availability of compulsory process to compel the attendance of unwilling witnesses, (vi) the location of the physical evidence, (vii) the enforceability of the judgment, (viii) in which forum can the case be tried more inexpensively and expeditiously, (ix) the relative court congestion in the two forums, (x) the public interest in local adjudication of local controversies, (xi) the relative familiarity of the courts with the applicable law, (xii) whether transfer is in the "interest of justice," (xiii) which forum would better serve judicial economy, and (xiv) whether a contractual clause specifies a specific forum to resolve contractual disputes. 17 *Moore's Federal Practice* § 111.13[1][b] (3d ed. 2001).

entitled to his choice of forum – especially given that he resides here – and that it would be extremely burdensome for someone of his limited means to litigate away from home – in contrast to the burden on the defendants, whom Daynard alleges to be extraordinarily rich.[11] Pl.'s Opp'n at 7-8, 10 [Docket No. 74]. The South Carolina defendants disagree for several reasons.

First, the South Carolina defendants argue that transferring the case to Mississippi would allow a single court to resolve this entire dispute, whereas the present situation likely will result in subsequent litigation. Defs.' Mem. at 14-15, 18-19. This is the South Carolina defendants' strongest argument, as the "possibility of consolidation" is routinely identified as one reason for allowing a motion to transfer. *E.g., Coady,* 223 F.3d at 11. Daynard, in response, effectively argues, "Obviously I know a single lawsuit involving all the witnesses would be easier – that's why I've appealed the decision to dismiss the Mississippi defendants – but I am entitled to my chosen forum." Daynard's argument is at least as strong as the argument in favor of consolidation.

Second, the South Carolina defendants question Daynard's I'm-just-a-poor-professor refrain. Defs.' Reply at 10. Given that Daynard will have to travel all over the country to depose witnesses – regardless of where the trial

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[11] Daynard also argues that venue is proper here in Boston, which nobody denies, given that he has many documents here and that some of the events in question took place here. Pl.'s Opp'n at 8-11. The documents Daynard has, though, relate to his academic research, not the contract at issue, and in a contract case it does not seem particularly important where the events took place, especially if they took place all over.

is held – the South Carolina defendants figure that Daynard will have to spend a lot of money on discovery no matter what the venue. The South Carolina defendants likely have their math correct, but if the discovery expenses are a wash, that favors Daynard, not the South Carolina defendants: all else being equal, there is a strong presumption in favor of the plaintiff's choice of forum.

Third, the South Carolina defendants argue that most of the witnesses will be from the South anyway, so Mississippi would be more convenient than Massachusetts. Defs.' Mem. at 17-18. As noted above, most courts consider the convenience of the witnesses second only to the plaintiff's choice of forum in importance. The question, then, is whether traveling to Boston (a nice place to visit and an East Coast transportation hub) is really more of a hassle for witnesses than traveling to Biloxi, Mississippi (an equally nice place to visit to escape the often meaningless hustle of a city in the Northeast, but not much of a transportation mecca).[12] The simple answer is that the parties have not identified the likely witnesses or their residences. At the moment, the only potential witnesses that have been identified are Daynard (from Boston), Mr. Scruggs (from nearby Pascagoula), Wendell Gauthier (from New Orleans, Louisiana, which is ninety miles from Biloxi), and Messrs. Motley and Rice (from Charleston, South Carolina). In other words, so far either (i) four witnesses must fly to

[12] The United States District Court for the Southern District of Mississippi holds court in Biloxi, Hattiesburg, and Jackson, Mississippi. Mr. Scruggs lives in Pascagoula, Mississippi, about twenty miles from Biloxi. The South Carolina defendants have specifically identified Biloxi as their preferred transferee venue.

Boston or (ii) three witnesses must fly to Biloxi (Gauthier will no doubt drive over from New Orleans) – not much of a difference either way.[13] Accordingly, on the limited record before the Court, Boston would appear no more inconvenient than Biloxi for those witnesses who must travel.

Finally, the South Carolina defendants argue that if Mississippi law governs this dispute, a Mississippi court would have more familiarity with the applicable law in this case. Defs.' Mem. at 19. There is reason to question whether this is still a proper factor to consider, *see supra* note 9, but in any event, the argument is premature because it is not clear if Mississippi law will, in fact, govern this dispute.

This discussion of relative trivia ought not obscure what is really going on here. This is a jury case. Daynard wants to try his case before a Massachusetts jury. The South Carolina defendants, allied with Mr. Scruggs, want to try the case before a Mississippi jury near Scruggs' home town. They know that all statistical studies show that if they can winkle Daynard out of his chosen forum, their chances of success escalate significantly. *See generally* Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping,* 80 Cornell L.Rev. 1507 (1995). Uneasy about conceding potential parochialism on the part of supposedly impartial juries, courts sweep the matter under the rug by emphasizing some supposed intrinsic value in the plaintiff's choice of forum. What we

[13] Daynard also has suggested that he would call to the stand various attorneys general from across the country, Pl.'s Opp'n at 11, but for them no single forum would be most convenient.

really mean, of course, is that in the absence of significant countervailing factors, the plaintiff ought get a crack at a jury in the venue of his choice.

In sum, Daynard has a strong argument that he is entitled to his choice of forum and the South Carolina defendants have a strong argument that it would be simpler to have a single trial in Mississippi. On the present record, the cost to the parties and witnesses is a wash and the other arguments are not persuasive. In light of these considerations, the Court will defer to Daynard's choice of forum at this time. Once trial approaches, however, the Court will be receptive to another motion to change venue, either by the South Carolina defendants, if they give *specific* and *concrete* reasons in support thereof, or by Daynard, if he concludes that he would prefer a trial that includes the Mississippi defendants.

IV. CONCLUSION

For the reasons set forth above, the Mississippi defendants' motion to dismiss for lack of personal jurisdiction [Docket No. 10] was ALLOWED on September 13, 2001, and the South Carolina Defendants' motion to dismiss or change venue [Docket No. 64] was DENIED on November 15, 2001.

UNITED STATES COURT OF APPEAL
FOR THE FIRST CIRCUIT

No. 01-2595

RICHARD A. DAYNARD,
Plaintiff, Appellant,

v.

NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE, P.A.; RONALD L. MOTLEY,
Defendants,

SCRUGGS, MILLETTE, BOZEMAN & DENT, P.A.; RICHARD F. SCRUGGS, Defendants, Appellees.

Before

Boudin, *Chief Judge*, Campbell and Bownes, *Senior Circuit Judges*, Torruella, Selya*, Lynch, Lipez and Howard, *Circuit Judges*.

ORDER OF COURT

Entered: June 17, 2002

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the

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* Judge Selya is recused from this matter.

Court in regular active service and a majority of said judges not having voted to order that the appeal be re-heard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Richard Cushing Donovan, Clerk.

By /s/ JANICE M. O'NEIL
Chief Deputy Clerk.

[cc: Messrs: Barshak and Prignano]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RICHARD A. DAYNARD, *Plaintiff,*	:	
v.	:	C.A. No. 01-10099-WGY
NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE, P.A., RONALD MOTLEY, SCRUGGS, MILLETTE, BOZEMAN & DENT, P.A., and RICHARD F. SCRUGGS, *Defendants.*	:	

AFFIDAVIT OF RICHARD F. SCRUGGS

(Filed Apr. 20, 2001)

I, Richard F. Scruggs, first being duly sworn upon oath, do depose and state as follows:

1. I am a resident and citizen of the state of Mississippi, and I make this affidavit on behalf of myself personally and on behalf of Scruggs, Millette, Bozeman & Dent, P.A., in support of defendants' motion to dismiss or, in the alternative, for summary judgment. All statements contained herein are based on my personal knowledge, except where otherwise indicated.

2. I am an attorney duly admitted to the practice of law in the state of Mississippi by the highest court of my state, and I remain an attorney in good standing in the state of Mississippi. I maintain law offices exclusively within the state of Mississippi.

3. I am the principal partner of the law firm known as Scruggs Legal, P.A. ("Scruggs Legal"), with an office address at 726 Delmas Avenue, Pascagoula, Mississippi. Scruggs Legal was formerly known as the firm of Scruggs, Millette, Bozeman & Dent, P.A. ("Scruggs Millette"). Scruggs Millette was a professional association of attorneys formed under the laws of the state of Mississippi.

4. I have read the complaint filed by Richard Daynard in the above matter against myself, Scruggs, Millette, Ronald Motley ("Motley") and Ness, Motley, Loadholt, Richardson & Poole, P.A. ("Ness Motley"). At no time did I ever form an agreement with Professor Daynard for the sharing of any portion of the fees earned by myself, Scruggs Millette or Ness Motley in the state tobacco litigation. Moreover, at no time did I ever agree to pay for any "services" allegedly rendered by Professor Daynard in the state tobacco litigation. It has always been my understanding that Professor Daynard acted as a volunteer in all of his endeavors with respect to the litigation, or was otherwise compensated by Ness Motley as a consultant on a limited basis, and that his activities were designed primarily to promote his own agenda with respect to tobacco control, as well as the interests of his various organizations, to wit: the Tobacco Control Resources Center and the Tobacco Products Liability Project. As will be discussed below, there were times when Professor Daynard's personal agenda differed dramatically from the interests of the various states that were represented by defendants in the state tobacco litigation.

INSUFFICIENT MASSACHUSETTS CONTACTS

5. Although Professor Daynard did at times consult with me concerning the tobacco litigation in general, these instances were extremely infrequent and were not requested or solicited by me. Moreover, none of these consultations took place in the state of Massachusetts nor did their subject matter concern tobacco litigation pending in the state of Massachusetts. The "assistance" provided by Professor Daynard consisted of nothing more than information already made available to the general public on websites run by his anti-tobacco organizations. This same information was made available by Professor Daynard to anyone for the asking and was certainly not created at my request. To my knowledge, I have never paid Professor Daynard for any of his limited contacts with me, as it was always my understanding that he acted gratuitously and to promote his tobacco control organizations.

6. At no time did I ever travel to the state of Massachusetts for any meetings in connection with an alleged fee-sharing arrangement, nor did I have any meetings or visit with Professor Daynard in Massachusetts in reference to the so-called fee sharing agreement. I have never been to Massachusetts in connection with any work performed by Professor Daynard pursuant to the so-called fee-sharing arrangement, or in connection with any work in the Massachusetts tobacco litigation.

7. Neither Scruggs Millette nor I currently have, or ever had, offices located in the state of Massachusetts. I do not practice law in the state of Massachusetts and have never practiced law in the state of Massachusetts. To my knowledge, neither Scruggs Millette nor I have ever

entered an appearance pro hac vice on behalf of any client in the state of Massachusetts.

8. Neither Scruggs Millette nor I own any real estate or other property located in the state of Massachusetts.

9. Neither Scruggs Millette nor I have any bank accounts located in the state of Massachusetts.

10. Although a number of states retained Scruggs Millette as special counsel to prosecute tobacco litigation, Massachusetts was not among those states. Consequently, neither Scruggs Millette nor I have served as special counsel in tobacco litigation on behalf of the state of Massachusetts. It should be noted that the Attorney General of Massachusetts was a very active participant in the States' tobacco litigation, and I worked with him and the Massachusetts' legal team to effectuate an overall settlement with various tobacco companies (which settlement Professor Daynard publicly opposed and worked to defeat), but never in Massachusetts and never as counsel to said state. In addition, although I do participate in an overall sharing of attorneys' fees with Ness Motley for the nationwide tobacco litigation, Massachusetts is only one state among many others in which fees are shared between our two firms. Further, the sharing of fees between Scruggs Millette and Ness Motley is not necessarily based on any active participation of our firms in particular states, but rather on our firms' overall contributions to the advancement of the nationwide litigation as a whole and ultimate global settlement of that litigation. Indeed, I have not actively participated in the Massachusetts state tobacco litigation. I would also note in this connection that Professor Daynard has stated in his complaint that "this litigation [does not] relate to attorneys' fees associated

with the Massachusetts State Tobacco Litigation." (Complaint page 16, footnote 1).

11. My own contacts with the state of Massachusetts are extremely limited and do not relate to Professor Daynard's alleged fee-sharing arrangement. At one point in the later half of 1995, I attended a seminar at the request of Professor Daynard in Massachusetts, but this occurred well before the so-called fee-sharing agreement alleged in the complaint. On or about July 20, 2000, I also attended a meeting of the International Academy of Trial Lawyers in Boston. My attendance at this meeting had nothing to do with Professor Daynard's fee-sharing claim, and also took place well after the alleged breach that Professor Daynard claims in his complaint. I also attended a Massachusetts fee arbitration hearing in Boston on June 16, 1999, as an observer of those proceedings. I did not participate at all in the proceedings before the arbitration panel, which in any event did not concern any claim by Professor Daynard to a share of fees with Scruggs Millette or Ness Motley. Again, my presence at that proceeding occurred well after Professor Daynard claims that defendants breached a fee sharing arrangement with him.

12. I have not traveled to or visited the state of Massachusetts for any reason having to do with Professor Daynard's claim that an oral fee-sharing agreement was created in Chicago, Illinois in August 1996.

THE RELEASE

13. Apart from the issue of personal jurisdiction and my lack of relevant contacts with the state of Massachusetts, all claims which Professor Daynard attempts to state in this proceeding have been expressly released.

Exhibit A to this affidavit is a "Mutual Release" which resulted from a settlement between the defendants and a consortium of law firms who claimed entitlement to a share of the same fees which are the subject matter of this suit. The Mutual Release identifies Professor Daynard as an active member of this consortium. The consortium's managing partner executed and delivered the Mutual Release with the authorization of, and on behalf of Professor Daynard and the other members. The pertinent language of the Mutual Release is as follows:

> The Castano Plaintiffs Legal Committee *and each and every law firm and lawyer now or formerly comprising part of it* . . . hereby release and forever discharge, Ness, Motley, Loadholt, Richardson & Poole and Scruggs, Millette, Bozeman & Dent, P.A., their present and former members . . . of and from any and all claims, rights or causes of action . . . that have been, could have been, or in the future might be asserted in any forum by the PLC *or any of its present or former members* . . . in connection with . . . any claim for fees or reimbursements of costs paid to or to be paid to Ness, Motley or Scruggs, Millette by virtue of fee arbitrations and liquidations pursuant to the MSA or Previously Settled States which have occurred or occurs in the future. (Emphasis added.)

14. Scruggs Millette has written fee agreements in all states in which it served as special counsel in the tobacco litigation. In providing the "services" that Professor Daynard alleges in the complaint, I am not aware that he acted in the capacity as an attorney representing any of the states for which he claims an entitlement to a portion of our fee, or that he acted in furtherance of the interests of the states in general. Indeed, the actions of Professor

Daynard during the course of the tobacco litigation led me to the understanding that his personal interests, and those of his organizations, were significantly different than – and often at odds with – the interests of the various states that I represented. In particular, Professor Daynard was vociferous in his opposition to legislation proposed in Congress designed to resolve the state tobacco litigation on a global basis. Professor Daynard had written extensively in opposition to that legislation and testified against the legislation in Congress. Likewise, Professor Daynard was vocal in his opposition to the settlement with the tobacco industry that ultimately resulted in the Master Settlement Agreement ("MSA") between the states and the major tobacco companies. None of these actions by Professor Daynard was consistent with the ethical obligations owed by an attorney to his client. It is indeed ironic that Professor Daynard now claims an entitlement to an attorneys' fee that was made possible by the very settlement that he worked so hard to defeat.

15. With respect to the fee-sharing arrangement alleged by Professor Daynard in his complaint, I am not aware that a single client was ever informed of such an arrangement or that any client provided its consent to a sharing of fees. Certainly, I never informed any client of a fee-sharing agreement because no such arrangement with Professor Daynard ever existed. Nor am I informed that Professor Daynard ever secured the consent of even a single client in relation to his claimed fee-sharing agreement.

16. As indicated above, I understood Professor Daynard to be acting as a volunteer in furtherance of his own interests in promoting tobacco control through the use of litigation. To the extent that Professor Daynard viewed

his role as that of an attorney or an expert consultant in the litigation, I understood that such services were undertaken on a pro-bono basis. Professor Daynard's involvement as a volunteer in the national tobacco litigation was consistent with his role in the Massachusetts tobacco litigation. Pursuant to Exhibit S to the MSA, Professor Daynard was listed as a special assistant attorney general for the state of Massachusetts to serve "without remuneration" as an expert consultant. (See attached Exhibit B.)

17. It should also be noted that this litigation is by no means the first attempt by Professor Daynard to secure a fee from the nationwide tobacco settlement. In addition to his participation in the Castano claims against defendants, Professor Daynard filed an extensive fee petition in the state of Florida on November 2, 1998, in connection with that state's tobacco litigation settlement. Professor Daynard presented his claim to a panel of arbitrators that was established pursuant to the procedure set forth in the tobacco MSA. In support of this petition, Professor Daynard filed a 90-page brief and 133-paragraph affidavit, together with numerous exhibits. The law firm of Boies & Schiller, L.L.P. in New York prepared the petition. Professor Daynard claimed that he was specifically retained by the state of Florida to act on its behalf as an attorney in the tobacco litigation, and that he was entitled to at least 7% of the fees awarded to other counsel in Florida. Other private attorneys retained by the state of Florida objected to Daynard's petition, arguing that the Professor (as he did in other aspects of the national tobacco litigation) acted solely as a volunteer and in furtherance of his own agenda against tobacco. In connection with litigation in the state of Florida over Professor Daynard's claim for attorneys' fees, William C. Gentry filed the affidavit attached hereto as

Exhibit C, setting forth his knowledge of Professor Daynard's involvement in the tobacco litigation. After consideration of Professor Daynard's petition, the arbitration panel rejected his claim for fees, finding that he had not been retained to act on behalf of the state of Florida in that state's litigation against the tobacco industry, and had otherwise acted as a volunteer. To my knowledge, Professor Daynard has not elected to pursue his claim for attorneys' fees in any other states pursuant to the arbitration procedures set up in the MSA.

18. At no point in Professor Daynard's extensive submissions to the arbitration panel did he mention any supposed fee-sharing agreement with the defendants in the instant matter. As noted, Professor Daynard's application in Florida was filed on November 2, 1998, more than two years after he claimed to reach an agreement for the sharing of fees with defendants in this case and nearly one year after he was advised that defendants denied any agreement with him.

19. Moreover, the release signed by the Castano PLC, which included Professor Daynard, was signed on January 13, 2000, nearly one year before Professor Daynard filed the instant case in Massachusetts Superior Court alleging an agreement to share in our fees.

/s/ Richard F. Scruggs
Richard F. Scruggs,
individually and on behalf
Of Scruggs, Millette, Bozeman
& Dent, P.A.

State of Mississippi
County of Jackson

Subscribed and sworn to, before me, this 19th day of April 2001.

/s/ Kristi Nicole Smith
Notary Public
My Commission Expires:
JAN. 27, 2004

MUTUAL RELEASE

WHEREAS, Ness, Motley, Loadholt, Richardson & Poole, 151 Meeting Street, Suite 600, Charleston, Southern Carolina, 29402 ("Ness Motley") and Scruggs, Millette, Bozeman & Dent, P.A., 734 Delmas Avenue, Pascagoula, Mississippi 39568 ("Scruggs, Millette") assert that they have certain claims against the Castano Plaintiffs' Legal Committee, a consortium of those individual lawyers and law firms identified on Exhibit A, with its office at 1100 Poydras Street, Suite 3000, New Orleans, Louisiana, 70163 (the "PLC"); and

WHEREAS, the PLC asserts that it has certain claims against Ness, Motley and Scruggs, Millette;

NOW, THEREFORE, for and in consideration of the premises, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows, to-wit:

1 – Ness, Motley, Loadholt, Richardson & Poole and Scruggs, Millette, Bozeman & Dent, P.A. do hereby release and forever discharge the Castano Plaintiffs' Legal Committee and each and every law firm and lawyer now or formerly comprising part of it, including without limitation, each of every such firm's present and former members,

partners, agents, employees, advisors, successors and assigns (in the aggregate "PLC Released Parties") of and from any and all claims, rights or causes of action, whether based on federal, state, local, statutory or common law or any other law, rule or regulation, and whether known or unknown, that have been, could have been, or in the future might be asserted in any forum by Ness, Motley, Loadholt, Richardson & Poole and Scruggs, Millette, Bozeman & Dent, P.A., or any of their present or former members, partners, employees, successors and the successors and assigns of each of them, whether directly representatively, derivatively or in any other capacity, against any of the PLC Released Parties, in connection with or that exist, could have existed, or might exist in the future that may arise out of or relate in anyway to (i) Ness, Motley's or Scruggs, Millette's association, membership and relationship whatsoever with the PLC, including without limitation, any claim for fees or reimbursements of costs in the past or future to the PLC resulting from those actions filed by or on behalf of the PLC listed on Exhibit B, actions or administrative proceedings filed by or on behalf of the PLC in the future and/or resulting from fee and/or cost arbitrations by the PLC pursuant to that certain Master Settlement Agreement ("MSA") dated November 23, 1998, entered into between various Tobacco Manufacturers and states Attorneys General, and (ii) any fees or reimbursement of costs paid to or to be paid to the PLC by virtue of arbitrations and/or liquidations pursuant to the MSA in the future.

2 – The Castano Plaintiffs Legal Committee and each and every law firm and lawyer now or formerly comprising part of it, including without limitation, each of every such firm's present and former members, partners, agents,

employees, advisors, successors and assigns does hereby release and forever discharge, Ness, Motley, Loadholt, Richardson & Poole and Scruggs, Millette, Bozeman & Dent, P.A., their present and former members, partners, agents, employees, advisors, successors and assigns (in the aggregate "Ness, Motley/Scruggs, Millette Released Parties") of and from any and all claims, rights or causes of action, whether based on federal, state, local, statutory or common law or any other law, rule or regulation, and whether known or unknown, that have been, could have been, or in the future might be asserted in any forum by the PLC or any of its present or former members, partners, employees, successors and the successors and assigns of each of them, whether directly, representatively, derivatively or in any other capacity, against any of the Ness, Motley, Scruggs, Millette Released Parties, in connection with or that exist, could have existed, or might exist in the future that may arise out of or relate in anyway to (i) Ness, Motley's or Scruggs, Millette's association, membership and relationship whatsoever with the PLC, and (ii) any claim for fees or reimbursements of costs paid to or to be paid to Ness, Motley or Scruggs, Millette by virtue of fee arbitrations and liquidations pursuant to the MSA or Previously Settled States which have occurred or occurs in the future.

3 – The parties executing this Mutual Release on behalf of Ness, Motley, Scruggs, Millette and the PLC respectively, hereby certify and warrant that they are duly authorized to execute and deliver it on behalf of the party for whom they sign.

4 – This Agreement may be executed in one or more counterparts, each of which shall be deemed an original,

but all of which together shall constitute one and the same instrument.

THUS DONE AND SIGNED this 13th day of January, 2000.

NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE

By: _____
Name: Joseph Rice

SCRUGGS, MILLETTE, BOZEMAN & DENT, P.A.

By: Richard F. Scruggs
Name: _____

CASTANO PLAINTIFFS' LEGAL COMMITTEE

By: Wendell H. Gauthier
Name: _____

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EXHIBIT A

CASTANO TOBACCO LITIGATION

PLAINTIFFS' LEGAL COMMITTEE

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Baggett, McCall & Burgess
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Mr. Scott Baldwin
Baldwin & Baldwin
400 W. Houston
Marshall, TX 75671

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Becnel, Landry & Becnel
106 West Seventh Street
Reserve, LA 70084

Mr. Raul Bencomo
Bencomo & Associates
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Hertin, Burstein, Sheridan, et al
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Mr. Alvaro R. Calderon, Jr.
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Mr. Stanley M. Chesley
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Rudoff & Sucharow
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Mr. Gary Eubanks
Gary Eubanks & Associates
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Little Rock, AR 72201

Mr. Calvin C. Fayard, Jr.
Fayard & Honeycutt
519 Florida Boulevard
Denham Springs, LA 70726

Mr. Gary Fine
Rodham & Fine
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Mr. John R. Climaco
Climaco, Lefkowitz, Peca,
Wilcox & Garofoli
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Mr. Russ M. Herman
Herman, Herman, Katz &
Cotlar
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Mr. Donald Hildre
Daugherty & Hildre
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Mr. Robert C. Hilliard
Hilliard & Heald
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Holden, Harig & Guidry
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Mr. Don Howarth
Howarth & Smith
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Hutton, Hutton, Fisher &
Andersen
8100 E. 22nd Street North,
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Wichita, Kansas 67226

Mr. Wendell H. Gauthier
Gauthier, Downing, et al.
3500 N. Hullen Street
Metairie, LA 70002

Mr. Meyer H. Gertler
Gertler, Gertler & Vincent
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Mr. Francis H. "Brother" Hare, Jr.
Hare, Wynn, Newell & Newton
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Mr. Walter J. Leger, Jr.
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South Dakota None

Tennessee John McArthur 3116 Pleasant Plains Rd. Apex, NC 27502 Phone: 919-363-9913 Fax: 919-363-9914

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Virginia None

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Robert L. Habush (Lead Counsel) Jeffrey P. Archibald Habush, Habush, Davis & Rottier 777 E. Wisconsin Ave. #2300 Milwaukee, WI 53202 Phone: 414-271-0900 Fax: 414-271-6854

Robert D. Scott Ross A. Anderson Whyte, Hirschboeck, Dudek, S.C. 111 East Wisconsin Ave. Milwaukee, WI 53202-7405 Phone: 414-273-4000 Fax: 414-223-5000

Wyoming None

**IN THE CIRCUIT COURT,
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA**

STATE OF FLORIDA, et al.

Plaintiffs,

Case No: CL95-1466AE

vs.

AMERICAN TOBACCO
COMPANY, et al.,

Defendants.

_____/

**AFFIDAVIT OF WILLIAM C. GENTRY
IN SUPPORT OF RESPONSE OF FLORIDA
TRIAL TEAM TO APPLICATION OF
RICHARD A. DAYNARD**

William C. Gentry, being first duly sworn, deposes and says:

1. I am one of the eleven attorneys (and their firms) who were employed by the State of Florida under a contingent fee contract to represent the State in its claims against the Tobacco Industry arising out of the sale of cigarettes to Medicaid recipients. I am one of Florida's private contract counsel designated as such by the Governor of the State of Florida in Schedule B of the Florida Fee Payment Agreement and I am generally familiar with all of the activities of the Florida Trial Team from the time of initial employment in February 1995 through the present date.

2. Because of the extraordinary magnitude of the effort that was anticipated and required to prosecute the litigation against the Tobacco Industry, the State of

Florida's private counsel organized themselves into teams to handle various aspects of the litigation. Each team had a coordinator or coordinators. Along with J. Wayne Hogan, Esquire, I undertook primary responsibility for coordinating all legal activities of the team, including the actual drafting or supervision of drafting of all pleadings, motions, memoranda and briefs before the Circuit Court. My other primary assignment was to assist J. Anderson Berly, Esquire and other members of his firm in coordinating the State's offensive discovery against the Industry. Because of the importance of maintaining continuity and consistency of position before the Court and Special Master, I either was present or was directly involved in coordinating all hearings before the Special Master and Circuit Court.

3. At some point in time fairly early in the litigation, I became aware of Richard A. Daynard, Esquire (Professor Daynard) as a result of his being present on a telephone conference call or at a meeting. I was concerned regarding his involvement because of attorney-client and other confidentiality considerations and inquired as to his status. I was advised that Professor Daynard had been an anti-tobacco advocate for many years and had volunteered to assist the State on a *pro bono* basis and that the client had agreed to permit him to attend our meetings. It was my understanding that Professor Daynard had not been employed by the State of Florida as counsel in the matter and at no time was he employed by the Florida Trial Team to assist us in the litigation.

4. As a result of my involvement in Florida's case, I learned of Professor Daynard's previous history with respect to tobacco issues and it was my understanding that he had some proprietary interest in publishing a tobacco litigation newsletter and being identified with

tobacco litigation. My only personal contact with Professor Daynard was when he would appear at some meeting or call into a telephone conference in which I was involved. Because he was not considered to be a member of the Trial Team and because of our concerns in regard to maintaining the confidentiality of our activities, I never personally invited Professor Daynard to any meetings or conference calls. I do not believe he was ever invited to attend any such meetings or calls by any member of the Trial Team. It was my understanding, however, that Harold Lewis from the Governor's office desired his attendance from time to time and as a result, he would invite Professor Daynard to attend. Based on Mr. Daynard's application, it would appear that Mr. Howard may have also invited his involvement from time to time. Although we had weekly telephone conferences of the entire Trial Team and virtually hundreds of smaller-group conferences and face-to-face team meetings at which I was present, I only recall Professor Daynard being present on approximately one half dozen occasions.

5. I have reviewed Professor Daynard's application to the arbitration panel. I have no basis upon which to question his claims regarding his invaluable efforts with respect to what he characterizes as the "first" and "second" wave of tobacco litigation. Information available to me indicates that Professor Daynard was an anti-tobacco activist for several years prior to the initiation of the Florida litigation and to the extent he has contributed through his academic work or otherwise to raising legal awareness of claims against the Tobacco Industry, he has undoubtedly provided a public service. However, the Florida Fee Payment Agreement was expressly entered into as part of the settlement between the State of Florida

and the Tobacco Industry to provide a means of compensating Private Counsel whom the State of Florida would otherwise be obligated to compensate for services rendered pursuant to the Contract of Employment between the State of Florida and Private Counsel. To the extent Professor Daynard's application implies that he performed compensable activities as Private Counsel to the State of Florida in the subject litigation, I have the following personal knowledge of relevant matters:

A. Although I was not personally involved in the drafting of the original complaint, I was directly involved and am knowledgeable of all subsequent pleadings and legal papers filed in the proceedings. I do not recall at any time consulting with Professor Daynard regarding any legal theories to be asserted in the action; Professor Daynard did not provide me with any proposed memoranda, legal arguments or information which was utilized in any of the hundreds of motions, memoranda and pleadings filed by Private Counsel in behalf of the State of Florida; and at no time did Professor Daynard argue any matters on behalf of the State of Florida.

B. Although I was involved in coordinating the State's offensive discovery, at no time did Professor Daynard provide me any "documents" or any advice or direction with respect to the discovery of documents. Although there were hundreds of discovery requests served on behalf of the State and weeks of discovery hearings held before the Special Master (all of which I either attended or was involved in obtaining coverage), I am unaware of Professor Daynard ever attending any discovery hearings before the Special Master, he did not ever make any argument in behalf of the State of Florida; and I am

unaware of his providing any information with respect to the handling of any hearings before the Special Master.

C. Although based upon Professor Daynard's submission, one would think I should have been aware of Professor Daynard's ground-breaking legal research and theories which he apparently assumes formed the underpinnings of our successful arguments, I was unaware of such legal work by Professor Daynard and never consulted or used any materials that he claims to have created. Although collectively we undoubtedly filed hundreds, if not thousands, of pages of motions and legal memoranda, I am unaware of any reference to any work by Professor Daynard and unless some other person subliminally utilized something that may have also emanated from Professor Daynard's mental processes, I am unaware of his "work product" being used in our presentations to the Court. With respect to Professor Daynard's claims as to his contributions to the State's racketeering causes of action, I am wholly unaware of Professor Daynard having any purported expertise with respect to that area of law. Indeed, the Trial Team employed Professor Robert Blakey, Esquire, to assist us with respect to racketeering issues because of his eminent qualifications in that area.

6. In summary, it was my understanding that Professor Daynard was an anti-tobacco activist who certain members of the Executive Branch of the State of Florida knew and allowed to involve himself in the Florida case. To the extent Professor Daynard claims to have had conversations or input to P. Tim Howard or Harold Lewis, I have no personal knowledge. However, it was my understanding and it is confirmed by the Governor in Exhibit B to the Florida Fee Payment Agreement, that any such activities were undertaken on a *pro bono* basis as to the

State and without any expectation or obligation of the State of Florida to compensate him. I have personal knowledge that Professor Daynard was not retained in any capacity by the Florida Trial Team and, in fact, he was generally excluded to the extent possible by the Florida Trial Team from any of their activities.

7. Undersigned counsel does not in any respect intend to demean any academic contributions or other public benefits Professor Daynard may have made with respect to Tobacco litigation related issues. However, in light of his application, it has become necessary to set out herein the facts that Professor Daynard did not serve as private contract counsel to the State of Florida and did not directly contribute to our legal representation of the State of Florida.

_____

William C. Gentry

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RICHARD A. DAYNARD, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 01-10099-WGY
NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE, P.A., RONALD MOTLEY, SCRUGGS, MILLETTE, BOZEMAN & DENT, P.A., and RICHARD F. SCRUGGS, Defendants.	)	

AFFIDAVIT OF RICHARD A. DAYNARD

I, Richard A. Daynard, on oath depose and say as follows:

JURISDICTION

1. I was retained to provide specialized knowledge in tobacco litigation and assistance to the two defendant law firms (respectively, hereafter "the Motley firm" and "the Scruggs firm") in Boston in 1993 when Charles Patrick, a member of the Motley firm, came to Boston and met with me for that purpose. At that time, the law firms were highly experienced in litigation, with a background in asbestos class actions, but with no experience in the special problems of litigation with the tobacco companies. At that time, I was, and had been since the early 1980's, well known for my prominence in efforts to protect the public health from the enormous destruction caused by smoking. I was a public advocate particularly for the use

of litigation against the tobacco companies as a means to accomplish that purpose. I have been publicly described as "the recognized leader in the movement for use of litigation as a tobacco control and public health strategy" (former Federal Trade Commission Chairman Michael Pertschuk), and as "the driving force behind the development of legal theories, compilation of evidence, and formulation of litigation strategies for tort and related litigation on behalf of government entities against the tobacco industry" (Dr. Ronald M. Davis, past Chairman of the Council on Scientific Affairs of the American Medical Association). I had founded and was the principal in the well-known Tobacco Products Liability Project located in Massachusetts and had become intimately familiar with the first and second "waves" of litigation against tobacco companies which had been regularly defeated by the defendant companies' use of massive legal forces and uniquely organized, extensive disinformation campaigns. I had acquired meaningful credibility and friendship with eminent researchers, scientists, and public health officials who would be indispensable to the successful presentation of a case against the tobacco industry. It was obvious to me, and I believe to Mr. Patrick, that his firm and I were a good fit.

2. When Charles Patrick first met with me in Boston, a major bulwark in the invariably successful tobacco industry defense was the contention that any resulting harm from smoking was caused by the smoker's exercise of his freedom of choice to smoke. Later that fall I introduced his partner, Susan Nial, to the theory that the tobacco companies were being unjustly enriched by the payments by states for medical bills resulting from smokers' ills, as a way to avoid that contention and as the basis for a direct

(not derivative) cause of action by states. I subsequently had many conversations, meetings and written communications in Boston with members of the defendant firms, in which I provided advice and undertook specific projects for their use in the tobacco litigation they were handling in Mississippi, Florida and eventually on a multi-state level involving almost all of the states. At their request, I made myself available to be present at the scheduled trial of the Mississippi case, at the expense of "buying out" my teaching duties at Northeastern Law School. From 1995 through 1997, at the request of Mr. Motley, I used my standing and familiarity with personnel in Attorneys Generals' offices to assist the Motley and Scruggs firms in their efforts to become outside counsel for several of the states involved in the national tobacco litigation. I worked extensively in Boston with members of the Motley firm and others in their representation of Massachusetts, which resulted in large fees paid to the Motley firm, and shared with the Scruggs firm, as admitted in paragraph 10 of Mr. Scruggs's affidavit.[1]

3. Throughout my dealings with the Motley and Scruggs firms, I understood that, as stated in the affidavit Mr. Scruggs has filed with this Court (paragraph 10), they were a joint venture as attorneys in the Mississippi, Florida and nationwide tobacco litigation. Besides the statements in the affidavit of Mr. Scruggs that his firm does "participate in an overall sharing of attorneys' fees with Ness, Motley for the nationwide tobacco litigation"

[1] As footnoted in my complaint, I do not seek any portion of the arbitration fees awarded for the Massachusetts case since I was compensated by one of the other firms.

and that "the sharing of fees between Scruggs, Millette and Ness, Motley is not necessarily based on any active participation of our firms in particular states, but rather on our firms' overall contributions to the advancement of the nationwide litigation as a whole and ultimate global settlement of that litigation," the existence of their joint venture agreement has become well publicized. For example, as described in "Assuming the Risk: The Mavericks, the Lawyers and the Whistle Blowers Who Beat Big Tobacco" by Michael Orey (Little Brown, Boston, 1999), pp. 265, *et seq.*, the Scruggs and Motley firms first became joint ventures with respect to the Mississippi litigation in 1993.

COMPENSATION

4. Initially my compensation, as paid by the Motley firm, was on an hourly fee basis. As time went on there were several conversations between me and both Mr. Motley and Mr. Scruggs in which they stated that they would appropriately compensate me for my relationship with them and that the final form of compensation would be to pay me a share of the fees they would receive upon successful handling of the multi-state litigation. As I alleged in paragraph 6 of my complaint, the compensation terms were made more specific and the agreement was "confirmed" in Chicago by Mr. Scruggs in August 1996. Mr. Motley, Mr. Scruggs and I were in Chicago attending a series of meetings of public and private counsel involved in bringing the multi-state tobacco litigation. Before coming to Chicago, Mr. Motley had told me by telephone that he, Mr. Scruggs and I would meet in Chicago to discuss the details of my compensation arrangement. At the appointed time set by Mr. Motley, I met Mr. Scruggs who explained

that Mr. Motley had another engagement but they had discussed together what it was they wanted to make explicit in terms of my compensation. Mr. Scruggs stated that my fair share of the fees generated in the state tobacco cases would be five percent. When I inquired whether he was speaking for both himself and Mr. Motley, he stated that I could rely upon that and that in any event, I could rely upon his apparent authority. Mr. Scruggs and I also discussed logistical details for my participation in the pending Mississippi trial, including the agreement to reimburse me for my expected expense to "buy out" a course I was teaching at Northeastern University Law School so that I would be free to spend the time in Mississippi.

5. In paragraph 14 of his affidavit, Mr. Scruggs states that I "was vocal in [my] opposition to the settlement with the tobacco industry that ultimately resulted in the Master Settlement Agreement ("MSA") between the states and the major tobacco companies." In the same paragraph, Mr. Scruggs states that I "was vociferous in [my] opposition to legislation proposed in Congress designed to resolve the state tobacco litigation on a global basis," which was the potential "global settlement" of 1997. In corresponding in the latter part of 1997, Mr. Rice of the Motley firm set forth my "opposition to the Global Settlement" as one reason why Motley and Scruggs were not obligated to pay me. However, there was no agreement that compensation owed to me was to be payable on the condition that I be silent about the public welfare issues involved. Of course, the contention that my compensation was conditional upon not opposing the global settlement is an indirect recognition that there was a compensation agreement, contrary to the absolute denial of any sort of a

compensation arrangement, as set forth in the affidavit of Mr. Scruggs.

SOURCE OF FEES

6. The legal fees to Motley and Scruggs, for which I seek my promised share, have been neither awarded nor paid by their clients, but were awarded by arbitrators created by the settlements in the Mississippi, Florida, and Texas cases, and thereafter by the 1998 Master Settlement Agreement between the attorneys general of 46 states (and several territories) and the tobacco companies. Under the terms of the Master Settlement Agreement, the fees so awarded shall be paid by the tobacco companies to the outside counsel in each state, and the fees so awarded to the outside counsel of a particular state shall be awarded as a single award. The division among the outside counsel is left to them for determination by the Master Settlement Agreement. In addition, the Master Settlement Agreement specifically provides in Section V of Exhibit O, incorporated in the Agreement, that the rights of any law firm to collect from the client state, pursuant to any contract between them, "shall be unaffected by" the arbitrator's award. Thus, the share of legal fees which I seek in this suit is, in no way, a share of fees to be paid by clients to the law firms.

THE CASTANO "MUTUAL RELEASE"

7. In paragraph 13 of his affidavit, Mr. Scruggs quotes from, and attaches as Exhibit A, a "mutual release." Mr. Scruggs then contends that it was an agreed upon release of the defendants which was intended to be and was binding upon me. The facts are to the contrary, as

follows: A group of law firms which had participated in the Castano class action complaint against tobacco companies in the United States District Court for Louisiana, identified as "Plaintiffs' Legal Committee" ("PLC") had created by written agreement an arrangement among themselves to handle class action and individual suits in the wake of the decertification of the Castano class originally alleged. The agreement provided for financial assessments to be paid by members and created a mechanism whereby fees ultimately received, for cases approved by the attorneys to be included in their arrangement, would be disbursed among them. There were several committees set up, such as an executive committee, a discovery committee, etc. The PLC agreement did not provide for a "managing partner" as alleged in Mr. Scruggs' affidavit. The agreement is signed by "plaintiffs' legal committee by Wendell Gauthier" and by various attorneys identified as "Attorney Member." Attached to my copy of the agreement is an exhibit which lists the various state class actions that were involved as of October 23, 1996. The attorneys-general's state cases for which the present defendants are to receive fees assessed by arbitrators against the tobacco companies are not among the cases listed on the exhibit attached to the agreement. There is nothing in the agreement which purports to give Wendell Gauthier authority to executive a release by one member of the committee of claims against another member of the committee.

8. On January 13, 2000, a "Memorandum of Understanding" (attached hereto as Exhibit A) was executed between the Motley and Scruggs law firms and the PLC. It was executed by Wendell Gauthier identified as Chairman of the PLC. There is no statement in it that Mr. Gauthier had authority to release claims by individual members.

The agreement does not purport to constitute a release of claims against the defendant law firms by or on behalf of any individual member of the PLC. Instead, in paragraph 2, it recites: "Within 20 days from the date hereof, all parties shall execute and deliver to the other a mutual release in the form attached hereto as Exhibit C." Exhibit C was entitled "Mutual Release" and contained a signature line to be signed by or on behalf of Member Firms and Individual Members. It was mailed to me by the executive secretary of the PLC with a letter (attached hereto as Exhibit B) requesting me to execute it "on the signature line for your signature" and return it within 20 days. I declined to execute it and, instead, had my then counsel send a letter back saying that I would not sign it. The executive secretary of the PLC then put in a tabbed book the mutual releases which had been executed by other members of the PLC and caused them to be delivered to the Motley firm. The Motley and Scruggs firms thus knew that I was not a party to the mutual releases labeled "Exhibit C".

/s/ Richard A. Daynard
Richard A. Daynard

Boston, Massachusetts May 16, 2001

Then personally appeared Richard A. Daynard and made oath that the above statements are true.

/s/ [Illegible]
Notary Public

My Commission Expires: 3/28/2003

[Tab A]

CONFIDENTIAL

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding is entered into by and between Ness, Motley, Loadholt, Richardson & Poole, 28 Bridgeside Boulevard, Mount Pleasant, South Carolina 29464 ("Ness, Motley") and Scruggs, Millete, Bozeman & Dent, P.A., 734 Delmas Avenue, Pascagoula, Mississippi 39568 ("Scruggs, Millette") and the Castano Plaintiffs' Legal Committee, a consortium of those individual lawyers and law firms identified on Exhibit A, with its office at 1100 Poydras Street, Suite 3000, New Orleans, Louisiana, 70163 (the "PLC").

WHEREAS, Ness, Motley and Scruggs, Millette assert that they have certain claims against the PLC; and

WHEREAS, The PLC asserts that it has certain claims against Ness, Motley and Scruggs, Millete.

NOW, THEREFORE, for and in consideration of the premises, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

1 – *Davis-Ellis Fee Arbitration*: Joseph F. Rice ("Rice"), a member of Ness, Motley and Richard F. Scruggs ("Scruggs"), a member of Scruggs, Millette, shall work and cooperate with and assist the PLC in its Tobacco Case fee arbitration (the "Davis-Ellis Fee Arbitration") related to *Ellis v. R. J. Reynolds Tobacco Co.*, No. J.C.C.P. 4041 (No. 706458) (Cal. Super. Ct.) pursuant to the "Ellis Arbitration Agreement," a copy of which is attached hereto as Exhibit B. Messrs. Rice and Scruggs agree to testify before the Davis-Ellis Fee Arbitration Panel with respect to the contribution by and value of the PLC in the Tobacco

litigation. This testimony will address their personal knowledge of the work, effort and impact of the PLC on the June 20, 1997 Proposed Resolution leading up to the payments to be made to the State of California under that certain Master Settlement Agreement ("MSA") dated November 23, 1998, entered into between various Tobacco Manufacturers and states Attorneys General.

Messrs. Rice and Scruggs also will work in good faith to assist and support the PLC in obtaining (i) a fair, reasonable and equitable hearing and result in the Davis-Ellis Fee Arbitration, (ii) an early arbitration date for the Davis-Ellis Fee Arbitration, and (iii) any other reasonable concessions from the Tobacco Manufacturers and others so long as in Rice's and Scruggs' good faith opinion, they are not contrary to the interests of Rice and Ness, Motley, Scruggs and Scruggs Millette or requires any action that would adversely affect the rights of their co-counsel. In addition to the aforementioned assistance to the PLC, Messrs. Rice and Scruggs have offered to review and give the PLC their comments on any materials which it intends to submit in the Davis-Ellis Fee Arbitration, provided that such review and comment are not such as that in their good faith opinions would preclude them from performing their normal services to their respective law firms, nor upholding the obligations which they have to co-counsel.

Any capitalized term used, but not defined herein, shall have the meaning given it in the MSA.

2 – *Mutual Releases*. Within twenty (20) days from the date hereof, all parties shall execute and deliver to the other a mutual release in the form attached hereto as Exhibit C.

3 – *Counterpart*. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

THUS DONE AND SIGNED effective this 13th day of January, 2000.

NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE

By: _____
Name: /s/ Joseph Rice

SCRUGGS, MILLETTE, BOZEMAN & DENT

By: /s/ Richard F. Scruggs
Name: _____

CASTANO PLAINTIFFS' LEGAL COMMITTEE

By: /s/ Wendell H. Gauthier
Name: Wendell H. Gauthier
Chairman

[EXHIBIT A – CASTANO TOBACCO LITIGATION PLAINTIFFS' LEGAL COMMITTEE
is reproduced *supra* at pages 125 to 129.]

EXHIBIT B

Ellis Arbitration Agreement

WHEREAS, a Master Settlement Agreement ("MSA") was executed on November 23, 1998 by Philip Morris

Incorporated, R. J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation and Lorillard Tobacco Company (the "Original Participating Manufacturers"), among others, and the attorneys general of 46 States, including the Attorney General of the State of California.

NOW, THEREFORE, the Original Participating Manufacturers, by their undersigned counsel, and the undersigned counsel for the Plaintiff in *Ellis v. R. J. Reynolds Tobacco Co.,* No. J.C.C.P. 4041 (No. 706458) (Cal. Super. Ct.), ("Ellis Counsel") agree that Ellis Counsel (together with such other plaintiffs' counsel for *Ellis*, if any, subsequently specified by Settling Defendants) shall be entitled to enter into an agreement with the Original Participating Manufacturers in the form of the Model Fee Payment Agreement attached as Exhibit O to the MSA (the "Agreement') and, for purposes of that Agreement, shall be treated as though they were listed on Exhibit S to the MSA and as though the *Ellis* action were listed on Exhibits D, M or N to the MSA; provided, however, that notwithstanding anything to the contrary in the Model Fee Payment Agreement:

> (1) Ellis Counsel shall not be entitled to participate in the selection of any arbitrator for any arbitration proceedings to be held pursuant to the Agreement between Settling Defendants and Ellis Counsel. Any arbitration proceedings to be held pursuant to such Agreement shall be conducted before the arbitration panel convened to determine attorneys' fees for those counsel identified by the relevant governmental prosecuting authorities of any California Litigating Political Subdivision or, in the event that there is no possibility of such an arbitration

panel being convened, before a panel of arbitrators selected to determine attorneys' fees for any action actually listed on Exhibits D, M or N to the MSA; and

(2) Ellis Counsel shall not be entitled to seek reimbursement of costs pursuant to section 19 of the Model Fee Payment Agreement. Ellis Counsel instead may seek to be reimbursed for costs in addition to an award of attorneys' fees in the arbitration proceedings to be held pursuant to the Agreement.

This document shall not be construed as an agreement as to the amount, if any, of attorneys' fees to be paid to Ellis Counsel and shall not become effective until such time as the *Ellis* case is dismissed with prejudice.

IN WITNESS WHEREOF, the parties hereto, though their fully authorized representatives, have entered into this Ellis Arbitration Agreement as of this 9th day of December, 1998.

/s/ [Illegible]
James S. [Illegible], for Philip Morris Incorporated
and on behalf of attorneys for the ORIGINAL
PARTICIPATING MANUFACTURERS

ELLIS COUNSEL

/s/ Mark P. Robinson, Jr.
Mark P. Robinson, Jr.
ROBINSON, CALCAGNIE & ROBINSON

/s/ Donald F. Hildre for the Castano Group
Donald F. Hildre
DOUGHERTY & HILDRE

/s/ David S. Casey
David S. Casey, Jr.
CASEY, GERRY, REED & SCHENK

CASTANO TOBACCO LITIGATION
PLAINTIFFS' LEGAL COMMITTEE
30TH FLOOR – ENERGY CENTRE
1100 POYDRAS STREET
NEW ORLEANS, LA 70163-3000

MEMORANDUM

DATE: January 25, 2000
TO: All PLC Members
FROM: Suzie Foulds
RE: Mutual Release Per Dick Vaynard

Dear Castano Member:

Pursuant to our telephone conversation, enclosed please find the Memorandum of Understanding between the Castano PLC and Ness, Motley, Loadholt, Richardson & Poole and Scruggs, Millette, Bozeman & Dent executed January 13, 2000. Also enclosed are two copies of the Mutual Release executed January 13, 2000 by Joe Rice, Richard Scruggs and Wendell Gauthier. There is a signature line for your signature on both copies of the Mutual Release. Please execute both copies of the Mutual Release and return them to my office as quickly as possible.

These executed copies must be in my hand no later than Monday, January 31, 2000. If you have any questions, please do not hesitate to call me.

Yours truly,

/s/ Suzie
Suzie V. Foulds

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action
No. 01-10099-WGY

* *

RICHARD A. DAYNARD,

Plaintiff,

v.

NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE, P.A., et al.,

Defendants.

* *

MOTION HEARING

BEFORE: The Honorable William G. Young,
District Judge

APPEARANCES:

SUGARMAN, ROGERS, BARSHAK & COHEN (By Edward J. Barshak, Esq. and Darrell C. Waugh, Esq.) 101 Merrimac Street, 9th Floor, Boston, Massachusetts 02114-3030, on behalf of Richard A. Daynard

ESDAILE, BARRETT & ESDAILE (By Patricia L. Kelly, Esq.), 75 Federal Street, Boston, Massachusetts 02110, on behalf of Ness, Motley, Loadholt, Richardson & Poole, P.A. and Ronald L. Motley

EDWARDS & ANGELL, LLP (By Stephen M. Prignano, Esq.), 2800 Financial Plaza, Providence, Rhode Island 02903, on behalf of Scruggs, Millette, Bozeman & Dent, P.A. and Richard F. Scruggs

1 Courthouse Way
Boston, Massachusetts

May 31, 2001

[2] THE COURT: Calling Civil Action 01-10099, Daynard v. Ness, Motley, et al.

MR. PRIGNANO: Stephen Prignano for the defendants Scruggs Millette, Bozeman & Dent and Richard F. Scruggs.

MR. BARSHAK: Edward Barshak for the plaintiff, Richard Daynard. With me my associate, Mr. Waugh.

THE COURT: Mr. Barshak, let's start with you.

MS. KELLY: Your Honor, may I identify myself. I'm here for another defendant.

I'm Patricia Kelly. I'm here for the defendants Ness, Motley, Loadholt, Richardson & Poole and Ron Motley.

THE COURT: Excuse me, Ms. Kelly, I apologize.

MS. KELLY: That's okay; it's quite all right.

THE COURT: But, you're here, but you're not joining in any of this.

MS. KELLY: We have filed – we filed a motion yesterday. We're not –

THE COURT: For summary judgment.

MS. KELLY: Right.

THE COURT: Which I will schedule and deal with.

MS. KELLY: Okay.

THE COURT: But you're certainly welcome.

MS. KELLY: Thank you.

THE COURT: All right, now, Mr. Barshak. How – you may get quite a ways here. But it seems to me that you [3] may come aproper [sic] on purposeful availment. What – even if you, even if we go that far, in light of the decision of the First Circuit in Sawtelle, how are you going to establish in this case the purposeful availment of the Scruggs firm of the right to conduct themselves in Massachusetts?

MR. BARSHAK: I think that gets me back to the initial proposition that we've argued in our brief with respect to attributation [sic] to the Scruggs firm of the conduct of their joint venturer here.

THE COURT: I think, I think – I think that – you're right. And I guess I ought to go to them

If that's his – they've submitted to jurisdiction, the South Carolina firm?

MR. PRIGNANO: Yes, your Honor.

THE COURT: You haven't.

MR. PRIGNANO: That's correct.

THE COURT: And he on behalf of Mr. Daynard says, well, you're joint venturers. If he's right on that this is a proper forum as to you because the Scruggs people are your agents. Of course on this record you've come forward with, at present, unrebutted data which suggests that that's not so. Upon such a record shouldn't I afford him some limited jurisdictional discovery on the issue of whether the Scruggs firm, the Mississippi firm, is a joint [4] venturer with the South Carolina firm who's subject to jurisdiction here.

MR. PRIGNANO: Your Honor, I understand you have that discretion. The problem here is I think that there's been no showing on the other side that there are any facts that they could produce that would identify these two firms as a joint venture at the relevant time.

At the time that's relevant here, which as I understand their position would be 1993, the time at which Ness, Motley is alleged to have gone into Massachusetts to seek out Professor Daynard, at that time it is undisputed, I would submit, that there was no joint venture between Scruggs and Ness, Motley.

Recall that the joint venture argument that they are advancing is based entirely upon a fee sharing arrangement between the Scruggs firm and the Ness, Motley firm. And we produced the affidavit of Richard Scruggs, which is unrebutted, that establishes convincingly and conclusively I'd say that that arrangement did not arise until April of 1999. And the timing of that issue is significant.

THE COURT: All right. Indeed it is.

Mr. Barshak, what discovery do you want specifically?

MR. BARSHAK: Before – may I answer, give your [5] Honor something before I answer that?

THE COURT: You can, but I thought I was giving you something by asking that question.

MR. BARSHAK: Well, I'm going –

THE COURT: You go ahead.

MR. BARSHAK: You are, and I'm going to accept the offer.

But, you know, what's stated as unrebutted is something that was a second affidavit filed here, apparently on

Tuesday of this week, which I saw for the first time, and I understand when I got in court today that in fact your Honor had granted on Tuesday their motion for this reply memorandum with this new affidavit. And so I have filed in the clerk's office today, and served on everybody, and I would like to give your Honor a copy of my motion for leave to file a memorandum in response to that, if I may do that.

THE COURT: You may and I'll receive it.

THE CLERK: You have it.

THE COURT: Ms. Smith just gave it to me. Didn't you get it in her hand? It was given to me as I came out.

MR. BARSHAK: I would like to have both document discovery and depositions with respect to their contention that they were not a joint venture.

THE COURT: Well, you have to be more specific [6] than that. Who do you want? What documents? I mean, how many depositions? This is just jurisdictional discovery.

MR. BARSHAK: Yes. I would be satisfied with two depositions.

THE COURT: All right, who?

MR. BARSHAK: Of Mr. Motley and Mr. Scruggs. And so far as documents are concerned, it's a little difficult to recite them specifically standing here right now.

THE COURT: How about documents which evidence the relationship of these two parties over, you name the time period.

MR. BARSHAK: From, from 1992 through 1998.

THE COURT: All right. Now, why shouldn't I give him that?

MR. PRIGNANO: Your Honor, we have other, other responses to this joint venture argument, one of which is that there's been no suggestion that Mr. Scruggs was personally the part of any joint venture. I think at a minimum in order to get discovery on something like that you would need to make at least a showing that they believe that Mr. Scruggs was part of all this. At bottom, even accepting what they've offered as true, it's only between Scruggs and Ness, Motley. Mr. Scruggs personally is not a part of this and they have no evidence to suggest otherwise.

[7] I think they need to show something a little bit more than they have in order to get some –

THE COURT: It would be a pretty short, it would be a pretty short deposition then, wouldn't it?

MR. PRIGNANO: Well, that's fine. I mean, we're not afraid of discovery, your Honor. We've submitted affidavits and the facts that we're putting forward are the facts that we think will be borne out.

THE COURT: I don't impugn them. How, how long will it take to get this discovery?

MR. BARSHAK: Well, I understand that both these gentlemen have their own airplanes so they can fly up without –

THE COURT: No, no. How long as a practical matter would it take? You want to take away their airplanes.

How long would it take?

MR. BARSHAK: Would one month be reasonable, your Honor?

THE COURT: Yes, I think – I'm going to grant that discovery. A month's time. I'll give you another month to file supplemental briefs.

I'll tell you right now that absent this joint venture argument, I came on the bench thinking, and we haven't really developed it, that while you get quite a [8] ways as against the Mississippi firm, the Scruggs firm, after Sawtelle I think you fall short. If you can make them a joint venturer with South Carolina, we'll see. but the record as I came on the bench is, is not favorable to that. It seems to me you'll have to discover something else that's not there, yet, to show that they're a joint venture. You say they are. The record does not bear that out at the relevant time. But a month for discovery, another month to file supplemental briefs, and I'll address the issue.

Now, in the meantime, Ness, Motley wants out, I haven't looked at it, but you want out on the merits, you've got summary judgment.

MS. KELLY: We have raised issues that have also been raised in the Scruggs' motion –

THE COURT: About release –

MS. KELLY: – for summary judgment. About mutual release and –

THE COURT: – and professional –

MS. KELLY: – the alleged fee sharing agreement.

THE COURT: Well, we'll address those in the ordinary course. But for the moment let's see if the Scruggs firm is even present in this Court. They insist that they're not and we'll get a full hearing on that.

Thank you.

[9] MR. PRIGNANO: Thank you, your Honor.

(Whereupon the matter concluded.)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

I, Donald E. Womack, do hereby certify that the above proceedings were reported by me stenographically and this transcript represents a true and accurate transcription of said proceedings.

DONALD E. WOMACK
Official Court Reporter
1 Courthouse Way, Suite 5510
Boston, Massachusetts 02210
(617) 439-8877

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RICHARD A. DAYNARD, *Plaintiff,*	:	
v.	:	C.A. No.
NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE, P.A., RONALD MOTLEY, SCRUGGS, MILLETTE, BOZEMAN & DENT, P.A., and RICHARD F. SCRUGGS, *Defendants.*	:	01-10099JLT

AFFIDAVIT OF RICHARD F. SCRUGGS

I, Richard F. Scruggs, first being duly sworn upon oath, do depose and state as follows:

1. I make this affidavit in further support of defendants' motion to dismiss or, in the alternative, for summary judgment. All statements contained herein are based on my personal knowledge, except where otherwise indicated.

2. I have reviewed the affidavit of Richard Daynard wherein he claims that, in 1993 and thereafter, there was a joint venture between the lawfirms of Scruggs, Millette, Bozeman & Dent, P.A. ("Scruggs Millette") and Ness, Motley, Loadholt, Richardson & Poole, P.A. ("Ness, Mootley") with respect to the prosecution of the nationwide litigation against the tobacco industry, and that, in connection with said joint venture, Professor Daynard was sought out in Massachusetts by Ness Motley for assistance in said litigation. I have also reviewed the portion of

Professor Daynard's affidavit wherein he claims that "the Scruggs and Motley firms first became joint venturers with respect to the Mississippi litigation in 1993." (See Daynard Affidavit at paragraph 3).

3. It is quite evident from a reading of Professor Daynard's affidavit that he does not have personal knowledge of agreements, if any, reached between Scruggs Millette and Ness Motley, and that Professor Daynard's assumptions regarding the alleged agreements are inaccurate and clearly wrong in several key respects.

4. As I stated in my original affidavit, there was an agreement between Scruggs Millette and Ness Motley for the sharing of fees in the nationwide tobacco litigation. However, what Professor Daynard does not know is that this agreement was formed in Mississippi in April of 1999. Prior to April of 1999, there was simply no agreement with respect to the sharing of attorneys' fees in the nationwide tobacco litigation between Scruggs Millette and Ness Motley.

5. In addition, it should be noted that the agreement for the sharing of fees reached in April of 1999 was between lawfirms and not individual attorneys. Consequently, I was not a party personally to any fee sharing agreement. Only the lawfirms of Scruggs Millette and Ness Motley were involved in the April 1999 agreement. Further, with respect to said fee sharing agreement, there was no agreement for the sharing of losses (if any) associated with the nationwide tobacco litigation. Nor was there any agreement that either Scruggs Millette or Ness Motley could exert control over tobacco litigation in states where those firms were not counsel of record.

6. With respect to Professor Daynard's statement that Scruggs Millette and Ness Motley were involved in a joint venture agreement with respect to the Mississippi state tobacco litigation, Professor Daynard is once again misinformed. Although Scruggs Millette did sign a joint venture agreement with other firms to prosecute the Mississippi litigation, Ness Motley was not a party to that agreement. Attached hereto as Exhibit A are relevant pages from the Mississippi joint venture agreement. As is shown on the signature pages, Ness Motley did not sign the agreement, and did not become a member of the joint venture. Although Ness Motley did participate in the Mississippi litigation, they were not part of the joint venture agreement with respect to the state of Mississippi. Moreover, no fee sharing agreement with respect to fees earned in the Mississippi litigation was formed between Scruggs Millette and Ness Motley at least until April, 1999.

/s/ Richard F. Scruggs
Richard F. Scruggs

State of MS)
County of Jackson)

Subscribed and sworn to before me this 25 day of May, 2001.

[SEAL] /s/ Kelly C. Stuart
Notary Public

JOINT VENTURE AGREEMENT

This agreement is made, by and between the following, hereinafter referred to as "Attorneys" or "Members":

The Attorneys are Scruggs, Millette, Lawson, Bozeman & Dent, P. A., Attorneys at Law ("Scruggs"), 734 Delmas Avenue, Pascagoula, MS 39568; Crymes G. Pittman, Attorney ("Pittman"), 410 South President Street, Jackson, MS 39201; Lewis & Lewis, P.A., Attorneys at Law ("Lewis"), P. O. Box 1600, Clarksdale, MS 38614; Barrett Law Offices, Attorneys at Law ("Barrett"), P. O. Box 631, Lexington, MS 39095; Frederick B. Clark, Attorney at Law, P. O. Box 1806, Greenwood, MS 38930; Charles Victor McTeer, McTeer & Associates, P. O. Box 1835, Greenville, MS 38702; David O. McCormick, Attorney ("McCormick"), 707 Watts Avenue, Pascagoula, MS 39568; Paul T. Benton, Attorney ("Benton"), 181 Main Street, Biloxi, MS 39530; Minor & Gice, P.A., Attorneys at Law ("Minor"), 400 Main Street, Biloxi, MS 39533; Oswald & Reed, Attorneys at Law ("Oswald"), 3106 Canty Street, Pascagoula, MS 39567; Thomas H. Rhoden, P.A., 111 Park Circle Drive, Jackson, MS 39208; Ness, Motley, Loadholt Richardson & Poole, P.A., Attorneys at Law ("Motley"), 151 Meeting Street, Suite 600, Charleston, SC 29402.

For valuable and sufficient consideration received, Attorneys do hereby agree to associate themselves as Joint Venturers and to form a Joint Venture for the purpose of accomplishing the objective of the Venture, and further, agree as follows:

1. *Purpose of Venture.* The objective or purpose for which the Venture is created is to perform the obligation of the Venture created by that certain *Memorandum of Understanding* entered into between certain of the members and the State of Mississippi to pursue litigation against particular members of the tobacco industry on behalf of the State of

Mississippi, a copy of which is attached hereto, or any other similar agreement in the manner prescribed by and in accordance with the terms of this Joint Venture Agreement. The Venture will not engage in any business or devote itself to any objective other than that specified, unless it arises out of or is reasonably incidental thereto.

2. *Venture Name.* The name of the Joint Venture is HEALTH ADVOCATES LITIGATION TEAM JOINT VENTURE and is hereinafter referred to as the "Venture" or "H.A.L.T. Venture" and all assets, agreements and transactions shall be taken, executed and performed in the name of the Venture.

* * *

Attorneys shall be deemed to have contributed equally to the preparation of this Agreement.

IN WITNESS WHEREOF THE PARTIES HAVE SIGNED THIS AGREEMENT ON THE DATES INDICATED OPPOSITE THEIR NAMES.

THOMAS H. RHODEN, P.A.
By: /s/ Tom H. Rhoden
DATE: December 28, 1994

CRYMES G. PITTMAN, ATTORNEY
/s/ Crymes G. Pittman
Crymes G. Pittman
DATE: Dec. 29, 1994

LEWIS & LEWIS, P.A.
By: /s/ [Illegible]
DATE: 15 Dec 94

BARRETT LAW OFFICES
By: /s/ Don Barrett
DATE: 11/2/94

PAUL T. BENTON,
ATTORNEY
/s/ Paul T. Benton
Paul T. Benton
DATE: 10/07/94

DAVID O. McCORMICK,
ATTORNEY
/s/ David O. McCormick
David O. McCormick
DATE: 10-4-94

OSWALD & REED,
ATTORNEYS AT LAW
By: /s/ Robert Oswald
DATE: 10-6-94

FREDERICK B. CLARK,
ATTORNEY
/s/ Frederick B. Clark
Frederick B. Clark
DATE: 11/11/94

SCRUGGS, MILLETTE,
LAWSON, BOZEMAN &
DENT, P.A.
By: /s/ Richard F. Scruggs
DATE: 9/30/94

CHARLES VICTOR
McTEER McTEER &
ASSOCIATES
By: /s/ [Illegible]
DATE: 10/28/94

NESS, MOTLEY,
LOADHOLT, RICHARDSON
& POOLE, P.A.
By: _____
DATE: _____

PAUL S. MINOR, P.A.
By: /s/ Paul S. Minor
DATE: Oct 20, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RICHARD A. DAYNARD Plaintiff, v. NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE, P.A., RONALD MOTLEY, SCRUGGS, MILLETTE, BOZEMAN & DENT, P.A., and RICHARD F. SCRUGGS, Defendants.	)	CIVIL ACTION NO. 01-10099-WGY

AFFIDAVIT OF RICHARD A. DAYNARD

I, Richard A. Daynard, on oath depose and say as follows:

JURISDICTION

1. I was retained to provide specialized knowledge in tobacco litigation and assistance to the two defendant law firms (respectively, hereafter "the Motley firm" and "the Scruggs firm") in Boston in 1993 when Charles Patrick, a member of the Motley firm, came to Boston and met with me for that purpose. At that time, the law firms were highly experienced in litigation, with a background in asbestos class actions, but with no experience in the special problems of litigation with the tobacco companies. At that time, I was, and had been since the early 1980's, well known for my prominence in efforts to protect the public health from the enormous destruction caused by smoking. I was a public advocate particularly for the use

of litigation against the tobacco companies as a means to accomplish that purpose. I have been publicly described as "the recognized leader in the movement for use of litigation as a tobacco control and public health strategy" (former Federal Trade Commission Chairman Michael Pertschuk), and as "the driving force behind the development of legal theories, compilation of evidence, and formulation of litigation strategies for tort and related litigation on behalf of government entities against the tobacco industry" (Dr. Ronald M. Davis, past Chairman of the Council on Scientific Affairs of the American Medical Association). I had founded and was the principal in the well-known Tobacco Products Liability Project located in Massachusetts and had become intimately familiar with the first and second "waves" of litigation against tobacco companies which had been regularly defeated by the defendant companies' use of massive legal forces and uniquely organized, extensive disinformation campaigns. I had acquired meaningful credibility and friendship with eminent researchers, scientists, and public health officials who would be indispensable to the successful presentation of a case against the tobacco industry. It was obvious to me, and I believe to Mr. Patrick, that his firm and I were a good fit.

2. When Charles Patrick first met with me in Boston, a major bulwark in the invariably successful tobacco industry defense was the contention that any resulting harm from smoking was caused by the smoker's exercise of his freedom of choice to smoke. Later that fall I introduced his partner, Susan Nial, to the theory that the tobacco companies were being unjustly enriched by the payments by states for medical bills resulting from smokers' ills, as a way to avoid that contention and as the basis for a direct

(not derivative) cause of action by states. I subsequently had many conversations, meetings and written communications in Boston with members of the defendant firms, in which I provided advice and undertook specific projects for their use in the tobacco litigation they were handling in Mississippi, Florida and eventually on a multi-state level involving almost all of the states. At their request, I made myself available to be present at the scheduled trial of the Mississippi case, at the expense of "buying out" my teaching duties at Northeastern Law School. From 1995 through 1997, at the request of Mr. Motley, I used my standing and familiarity with personnel in Attorneys Generals' offices to assist the Motley and Scruggs firms in their efforts to become outside counsel for several of the states involved in the national tobacco litigation. I worked extensively in Boston with members of the Motley firm and others in their representation of Massachusetts, which resulted in large fees paid to the Motley firm, and shared with the Scruggs firm, as admitted in paragraph 10 of Mr. Scruggs's affidavit.[1]

3. Throughout my dealings with the Motley and Scruggs firms, I understood that, as stated in the affidavit Mr. Scruggs has filed with this Court (paragraph 10), they were a joint venture as attorneys in the Mississippi, Florida and nationwide tobacco litigation. Besides the statements in the affidavit of Mr. Scruggs that his firm does "participate in an overall sharing of attorneys' fees with Ness, Motley for the nationwide tobacco litigation"

[1] As footnoted in my complaint, I do not seek any portion of the arbitration fees awarded for the Massachusetts case since I was compensated by one of the other firms.

and that "the sharing of fees between Scruggs, Millette and Ness, Motley is not necessarily based on any active participation of our firms in particular states, but rather on our firms' overall contributions to the advancement of the nationwide litigation as a whole and ultimate global settlement of that litigation," the existence of their joint venture agreement has become well publicized. For example, as described in "Assuming the Risk: The Mavericks, the Lawyers and the Whistle Blowers Who Beat Big Tobacco" by Michael Orey (Little Brown, Boston, 1999), pp. 265, *et seq.*, the Scruggs and Motley firms first became joint venturers with respect to the Mississippi litigation in 1993.

COMPENSATION

4. Initially my compensation, as paid by the Motley firm, was on an hourly fee basis. As time went on there were several conversations between me and both Mr. Motley and Mr. Scruggs in which they stated that they would appropriately compensate me for my relationship with them and that the final form of compensation would be to pay me a share of the fees they would receive upon successful handling of the multi-state litigation. As I alleged in paragraph 6 of my complaint, the compensation terms were made more specific and the agreement was "confirmed" in Chicago by Mr. Scruggs in August 1996. Mr. Motley, Mr. Scruggs and I were in Chicago attending a series of meetings of public and private counsel involved in bringing the multi-state tobacco litigation. Before coming to Chicago, Mr. Motley had told me by telephone that he, Mr. Scruggs and I would meet in Chicago to discuss the details of my compensation arrangement. At the appointed time set by Mr. Motley, I met Mr. Scruggs who explained

that Mr. Motley had another engagement but they had discussed together what it was they wanted to make explicit in terms of my compensation. Mr. Scruggs stated that my fair share of the fees generated in the state tobacco cases would be five percent. When I inquired whether he was speaking for both himself and Mr. Motley, he stated that I could rely upon that and that in any event, I could rely upon his apparent authority. Mr. Scruggs and I also discussed logistical details for my participation in the pending Mississippi trial, including the agreement to reimburse me for my expected expense to "buy out" a course I was teaching at Northeastern University Law School so that I would be free to spend the time in Mississippi.

5. In paragraph 14 of his affidavit, Mr. Scruggs states that I "was vocal in [my] opposition to the settlement with the tobacco industry that ultimately resulted in the Master Settlement Agreement ("MSA") between the states and the major tobacco companies." In the same paragraph, Mr. Scruggs states that I "was vociferous in [my] opposition to legislation proposed in Congress designed to resolve the state tobacco litigation on a global basis," which was the potential "global settlement" of 1997. In correspondence in the latter part of 1997, Mr. Rice of the Motley firm set forth my "opposition to the Global Settlement" as one reason why Motley and Scruggs were not obligated to pay me. However, there was no agreement that compensation owed to me was to be payable on the condition that I be silent about the public welfare issues involved. Of course, the contention that my compensation was conditional upon not opposing the global settlement is an indirect recognition that there was a compensation agreement, contrary to the absolute denial

of any sort of a compensation arrangement, as set forth in the affidavit of Mr. Scruggs.

SOURCE OF FEES

6. The legal fees to Motley and Scruggs, for which I seek my promised share, have been neither awarded nor paid by their clients, but were awarded by arbitrators created by the settlements in the Mississippi, Florida, and Texas cases, and thereafter by the 1998 Master Settlement Agreement between the attorneys general of 46 states (and several territories) and the tobacco companies. Under the terms of the Master Settlement Agreement, the fees so awarded shall be paid by the tobacco companies to the outside counsel in each state, and the fees so awarded to the outside counsel of a particular state shall be awarded as a single award. The division among the outside counsel is left to them for determination by the Master Settlement Agreement. In addition, the Master Settlement Agreement specifically provides in Section V of Exhibit O, incorporated in the Agreement, that the rights of any law firm to collect from the client state, pursuant to any contract between them, "shall be unaffected by" the arbitrator's award. Thus, the share of legal fees which I seek in this suit is, in no way, a share of fees to be paid by clients to the law firms.

THE CASTANO "MUTUAL RELEASE"

7. In paragraph 13 of his affidavit, Mr. Scruggs quotes from, and attaches as Exhibit A, a "mutual release." Mr. Scruggs then contends that it was an agreed upon release of the defendants which was intended to be and was binding upon me. The facts are to the contrary, as

follows: A group of law firms which had participated in the Castano class action complaint against tobacco companies in the United States District Court for Louisiana, identified as "Plaintiffs' Legal Committee" ("PLC") had created by written agreement an arrangement among themselves to handle class action and individual suits in the wake of the decertification of the Castano class originally alleged. The agreement provided for financial assessments to be paid by members and created a mechanism whereby fees ultimately received, for cases approved by the attorneys to be included in their arrangement, would be disbursed among them. There were several committees set up, such as an executive committee, a discovery committee, etc. The PLC agreement did not provide for a "managing partner" as alleged in Mr. Scruggs' affidavit. The agreement is signed by "plaintiffs' legal committee by Wendell Gauthier" and by various attorneys identified as "Attorney Member." Attached to my copy of the agreement is an exhibit which lists the various state class actions that were involved as of October 23, 1996. The attorneys-general's state cases for which the present defendants are to receive fees assessed by arbitrators against the tobacco companies are not among the cases listed on the exhibit attached to the agreement. There is nothing in the agreement which purports to give Wendell Gauthier authority to execute a release by one member of the committee of claims against another member of the committee.

8. On January 13, 2000, a "Memorandum of Understanding" (attached hereto as Exhibit A) was executed between the Motley and Scruggs law firms and the PLC. It was executed by Wendell Gauthier identified as Chairman of the PLC. There is no statement in it that Mr. Gauthier had authority to release claims by individual members.

The agreement does not purport to constitute a release of claims against the defendant law firms by or on behalf of any individual member of the PLC. Instead, in paragraph 2, it recites: "Within 20 days from the date hereof, all parties shall execute and deliver to the other a mutual release in the form attached hereto as Exhibit C." Exhibit C was entitled "Mutual Release" and contained a signature line to be signed by or on behalf of Member Firms and Individual Members. It was mailed to me by the executive secretary of the PLC with a letter (attached hereto as Exhibit B) requesting me to execute it "on the signature line for your signature" and return it within 20 days. I declined to execute it and, instead, had my then counsel send a letter back saying that I would not sign it. The executive secretary of the PLC then put in a tabbed book the mutual releases which had been executed by other members of the PLC and caused them to be delivered to the Motley firm. The Motley and Scruggs firms thus knew that I was not a party to the mutual releases labeled "Exhibit C".

/s/ Richard A. Daynard
Richard A. Daynard

Boston, Massachusetts May 16, 2001

Then personally appeared Richard A. Daynard and made oath that the above statements are true.

/s/ [Illegible]
Notary Public

My Commission Expires: 3/28/2003

[Tab A – Confidential Memorandum of Understanding is reproduced *supra* at pages 165 to 167.

Exhibit A – Castano Tobacco Litigation Plaintiffs' Legal Committee is reproduced *supra* at pages 125 to 129.

Exhibit B – Ellis Arbitration Agreement is reproduced *supra* at pages 167 to 169.

Tab B – Memorandum of January 25, 2000 is reproduced *supra* at page 170.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action
No. 01-10099-WGY

* *

RICHARD A. DAYNARD,

Plaintiff,

v.

NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLES, P.A., et al.,

Defendants.

* *

MOTION HEARING

BEFORE: The Honorable William G. Young, District Judge

APPEARANCES:

SUGARMAN, ROGERS, BARSHAK & COHEN, (By Edward J. Barshak, Esq. and Darrell C. Waugh, Esq.) 101 Merrimac Street, 9th Floor, Boston, Massachusetts 02114-3030, on behalf of Richard A. Daynard

ESDAILE, BARRETT & ESDAILE (By Michael E. Mone, Esq. and Patricia L. Kelly, Esq.), 75 Federal Street, Boston, Massachusetts 02110, on behalf of Ness, Motley, Loadholt, Richardson & Poole, P.A. and Ronald L. Motley

EDWARDS & ANGELL, LLP (By Stephen M. Prignano, Esq.), 2800 Financial Plaza, Providence, Rhode Island 02903, on behalf of Scruggs, Millette, Bozeman & Dent, P.A. and Richard F. Scruggs

1 Courthouse Way
Boston, Massachusetts

September 13, 2001

[2] THE CLERK: Calling 01-10099, Daynard v. Ness, Motley.

THE COURT: Would counsel identify themselves.

MR. BARSHAK: Edward Barshak and Darrell Waugh for the plaintiff, Daynard.

MR. MONE: Mike Mone and Patricia Kelly for Ness, Motley and Ron Motley.

MR. PRIGNANO: Stephen Prignano for the defendants Scruggs, Millette, Bozeman and Dent and Richard F. Scruggs.

THE COURT: All right, let me start with Mr. Barshak. And so we know where I'm going to grab hold of this, I'm going to grab hold on personal jurisdiction because that's where I should start and we'll see if we get to the summary judgment.

But my question is more a pleading question first. Mr. Scruggs is a necessary party to the cause of action as he is the contracting party from your point of view. I mean, he says he isn't, but that, a fact finder will find that. Correct?

MR. BARSHAK: Not really, your Honor. Because the original retaining of my client was done by a member of the Ness, Motley law firm who we claim at that time, as shown by subsequent pretrial discovery, was acting for both firms. So –

THE COURT: But your agreement, this five percent [3] agreement on the handshake, that's with Mr. Scruggs himself you say.

MR. BARSHAK: Well, again, your Honor, I think that is not really the way it's been pleaded or the way the affidavits have been presented to you. And that is the original agreement was one that was not in any particular percentage. This is all set forth in affidavits your Honor has.

THE COURT: Yes.

MR. BARSHAK: It was an agreement to retain Professor Daynard as a consultant and to assist in what was at that point Mississippi litigation, which became national litigation, with these two law firms which was well expected, because what we're really talking about is a retention by him, a retention of him by two law firms who are, who were experienced trial attorneys.

THE COURT: We'll follow it out your way. Ness does not, the Ness firm does not challenge personal jurisdiction.

MR. BARSHAK: Right.

THE COURT: So they're here and I have jurisdiction. The Scruggs, Mr. Scruggs, and his firm, they do challenge personal jurisdiction. So, let me hear you why Mr. Scruggs and firm should be here.

MR. BARSHAK: Okay. May I ask, has your Honor [4] seen the latest motion that I filed this morning? I couldn't file it yesterday. It's a short motion to file a short brief which has some cases your Honor will –

THE COURT: Happy to receive it, but the short answer is no, I have not reflected on it.

MR. BARSHAK: This is a copy and my brothers got it by fax yesterday.

THE COURT: Fine.

MR. BARSHAK: The answer, the answer to your Honor's question, if I may, is that you have two law firms which, as shown by exhibits which are appended to the deposition of Mr. Scruggs, which was taken fairly recently, two law firms which from the date of the retention in Massachusetts of Professor Daynard as a consultant were joined together in an arrangement whereby they were going to handle the litigation, the tobacco litigation against Mississippi and two other states and subsequently turned out to be something like forty odd states.

They concede, Scruggs concedes in prior submissions that ultimately they shared, two law firms shared all these fees, they lumped them, no matter which firm –

THE COURT: No, but if that's what's determinative here. Let me put it back to you, and if I don't have this right tell me where I'm wrong.

[5] You say, well, we've got Ness, and you do here. The way we get Scruggs and his firm is they were in a joint venture with Ness.

MR. BARSHAK: Yes, sir.

THE COURT: And there's voluminous data here, and I've gone through the briefs and I've gone through some of the additional data.

The problem with that, your big problem seems to be the First Circuit's decision in Donatelli. Because a joint venture is an unincorporated association, and that then turns on this ability of the, the one that's not otherwise subject to jurisdiction, the Mississippi firm, with Mr. Scruggs in it, to exercise substantial influence over Ness in South Carolina. Where's – and have in mind, correct me if I've got this fact wrong, there's no written joint venture agreement. Ness carefully refused to sign joint venture agreements fearing the tax consequences in Mississippi.

So, this issue of substantial influence under Donatelli seems to be your sticking point. I have little doubt that they worked as close allies. And I can even remember being in practice and doing that. It's not the same thing as having a joint venture that subjects you to jurisdiction in another state.

That's my problem. I'll hear you.

[6] MR. BARSHAK: Okay. First, there is no real comparison between the two law firms and their relationship on the one hand and the National Football League, I guess it was, loose association in Donatelli. This is – the two law firms which according to the documents, the letters written by Mr. Rice of Ness, Motley from the very beginning of their joining together in tobacco litigation, have been acting pursuant to the agreement which Ness, Motley didn't sign, for reasons having nothing to do with the question of working together, but says Mr. Rice we've been acting under that from the very beginning as you know. I think that's tantamount to the two firms having signed.

And if you look at Exhibit 1 in the deposition of Mr. Scruggs, that, which is entitled Joint Venture Agreement,

it sets forth in great detail, your Honor, which was left out in the original affidavit by Mr. Scruggs, in great detail how they're going to share costs, how they're going to share functions, who's going to do what, and that is totally different from the loose association involved in Donatelli.

THE COURT: Well, the loose association was the National Hockey League. And one imagines that they had various agreements. The issue is not, the issue is not whether they had this agreement. I think I would be prepared to find that notwithstanding the fact they refused [7] to sign, at least as to the Mississippi litigation, the Ness firm did enter into a joint venture with the Scruggs firm.

My problem is that I'm not – this record seems devoid of the ability of the Scruggs firm to exercise substantial influence over the lawyering practices of the Ness firm. Where in this agreement or where in the affidavits or the actual conduct of the parties is the factual predicate that Scruggs could, I think Donatelli does control, exercise substantial influence over Ness?

MR. BARSHAK: Okay. I think, if your Honor please, you will find in the cases, the four cases that I have given to the Court today, from which there are excerpts, including a decision of the Supreme Court of Mississippi where their relationship first began, that inherent in their joint participation, which would result in fees eventually, inherent in that is a responsibility of each one toward each of the cases so that that constitutes the influence, the joint control, which is typically a part of a joint venture. And the language of the Supreme Court of Mississippi as recently as 1994 in a case, which I don't know why nobody gave it to you before, I apologize at our end, I don't know

what the other side will say, but makes it pretty clear that what is before your Honor here with respect to the affidavits as to what took place between the [8] two law firms, particularly as shown in the documents, is something which is easily concluded to be a joint venture.

THE COURT: Let me ask you this. Suppose I agree with you and suppose I think that that's sufficient for jurisdiction over the Ness firm. Why – I grant you the scope of their alliance ultimately extended far beyond Mississippi. Why would I have jurisdiction then over – if, if this joint venture agreement that they enter into with Ness is sufficient to establish the purposeful availment test to bring them within the jurisdiction of a district court sitting in Massachusetts, why would my jurisdiction go any further than the fees to be allocated out of the Mississippi settlement?

MR. BARSHAK: Because your Honor has before you more than just evidence of a joint venture in Mississippi. I am referring specifically to the fact that there are, the same relationship between the two law firms, the defendant law firms exists throughout state, throughout many of the state cases during the same period which is shown by the affidavit, the second affidavit of Professor Daynard to be the period during which both, members of both law firms frequently invoking use of his services here in Massachusetts. But particularly the Ness, Motley law firm.

THE COURT: Let me ask you to assume something the opposite way. Suppose on personal jurisdiction I were to [9] conclude that I cannot exercise jurisdiction over the Scruggs firm or Mr. Scruggs. Personal jurisdiction. Your position then is what? Because you have Ness here.

And suppose I were then to say, well, all right, I don't have jurisdiction over them, really what I ought to do is transfer this to the United States District Court sitting in Mississippi where you clearly will have jurisdiction over the two.

How would you feel about that?

MR. BARSHAK: I would, if your Honor will pardon my language, violently object.

THE COURT: All right. Well, I understand your position.

MR. BARSHAK: Because –

THE COURT: Even if you lose, even if you lose Scruggs you want to go here against Ness?

MR. BARSHAK: Yes, your Honor. And I accent, I accent that. This – the jurisdictional law as I understand it, and your Honor will correct me if I'm wrong, is one which, when you're talking about transferring to another district, is one whereby if there are factors in Massachusetts, such as Professor Daynard being here, doing the work here, many of the contacts between the law firms and him taking place here, if he chooses to bring suit here –

[10] THE COURT: Oh, no, all those things should have great weight. I'm asking you to think what for you is unthinkable. That all you have here is the Ness firm. You don't have Scruggs. Because I don't have personal jurisdiction. You say nevertheless you want to press on against Ness here. That's the premise of my, my concern.

MR. BARSHAK: Yes. Can I be more specific, your Honor? Not only would I want to press against Ness here, but I believe so firmly that there is, at this stage of the game on a motion to dismiss that certainly I am arguing that it shouldn't be thrown out on jurisdiction at this point where the standard is prima facie evidence. I would prefer to get that decided one way or the other by the First Circuit and then go forward with the rest of the case rather than go down to Mississippi. I have nothing against Mississippi.

THE COURT: I'm sure you don't. No, I understand. In other words, you want to appeal. All right. Which is fine.

Let me hear from the Scruggs' firm representative. Have you had a chance to review these cases? I have not.

MR. PRIGNANO: I have, your Honor, and let me address those cases first because I think there's a critical distinction between what's been shown to you there from Mississippi and the Donatelli case.

[11] Those cases that are Mississippi cases first of all are not jurisdictional cases; they are joint venture type cases.

THE COURT: But certainly I am interested in –

MR. PRIGNANO: No question, your Honor.

THE COURT: – the nature of the joint venture here.

MR. PRIGNANO: Absolutely, your Honor. I'm just, I'm just drawing the distinction between those cases and the additional requirement that's imposed by Donatelli

in this circuit that requires in order to impute these jurisdictional context [sic] through the vehicle of a joint venture, assuming it's established, you additionally must have some evidence of influence and control by the joint venture over Ness, Motley's activities in the foreign jurisdiction, namely in Massachusetts. And the record is absolutely devoid of any such evidence. Mr. Scruggs was recently deposed at length on that issue, among others, and testified very clearly that there was no control by any joint venture, let alone one in Mississippi or a national, or a supposed national joint venture over Scruggs – I'm sorry, over Ness, Motley in the state of Massachusetts. And that is a very critical failing of the plaintiff's position here.

THE COURT: Let me ask you this. This is not the [12] only motion that you folks have.

MR. PRIGNANO: That's correct.

THE COURT: But it is the first one that I must deal with logically. Don't take any particular comfort from this. Suppose I agree with you and think that I don't have jurisdiction over Mr. Scruggs or his firm. How do you feel about my sending the whole thing to Mississippi?

MR. PRIGNANO: That's where we think the case should be, your Honor.

THE COURT: That's where you think it should be?

MR. PRIGNANO: Absolutely.

THE COURT: Now, I'm not at all hesitant to be reviewed on my decisions. That's salutary in virtually every circumstance. But maybe I should stay my hand on a transfer since Mr. Barshak says if I go that way, because

he wants to appeal and I would want him to appeal. That's more rhetorical than a question.

Let me ask Mr. Mone a question. On this – where you think the case should be, Mr. Mone.

MR. MONE: Mississippi.

THE COURT: These aren't, these aren't – Mississippi.

MR. MONE: Mississippi. Your Honor, you have to, you have to understand that one of the, one of his claims is against a Mississippi fee and the courts in Mississippi [13] retain jurisdiction over Mississippi fees.

THE COURT: Now back to the Scruggs counsel. I'm sorry, I don't have your name, sir.

MR. PRIGNANO: That's Mr. Prignano. Steve Prignano.

THE COURT: Yes, Mr. Prignano.

What about your other motion, in this sense. The motion is fully ripe, carefully briefed, here you all are. I'm prepared to hear you. Don't let me sucker you in to something here. And I'm not –

MR. PRIGNANO: I understand.

THE COURT: – I'm not clear on the outcome.

If I hear you now – in other words, I'm hearing you on the putative assumption I have personal jurisdiction.

MR. PRIGNANO: Yes.

THE COURT: Where you argue strenuously I don't. I'm not doing it twice. I'm not going to have any

court do it twice. But I can think of value in entertaining further argument on summary judgment.

There are the various possible outcomes. And you're the one who I think is the center here. Or you're the one that, it has a logical disjunct. You can win on personal jurisdiction, lose on summary judgment. That logically doesn't make sense. But if it makes sense, I [14] want it to be law of the case. Conversely, you could lose on summary judgment – you could lose on personal jurisdiction, win on summary judgment, or I can just do personal jurisdiction. And once I've sorted that out we'll get to summary judgment. That's, that's the most conservative course, because you know what I'm doing on personal jurisdiction before you get a chance to be heard on summary judgment. So a district judge in Mississippi hears you, or maybe I hear you on summary judgment once the First Circuit's reversed me.

I don't mean to trap you but I mean to ask you first. Do you want to be heard on summary judgment today? Recognizing you've already, what's the analogy, you've fired your salvo on personal jurisdiction. Or, do you want to hear the end to personal jurisdiction when I get around to deciding it before we get to summary judgment.

MR. PRIGNANO: My position coming here today, your Honor, was to deal with the personal jurisdiction issue because that is first and foremost what we're here for as far as my client is concerned. I understand that Mr. Mone and Ness, Motley has raised identical issues in their motion for summary judgment as we have. So, I think –

THE COURT: So really, really you can get the benefit of both worlds because I'll hear Mr. Mone.

MR. PRIGNANO: Well, that's, that's correct. I [15] think that is correct.

THE COURT: Fine. I understand that. All right. I think maybe we ought to move on to that and hear Mr. Mone.

MR. MONE: Well, logically I think you ought to decide personal jurisdiction because I say, I say Scruggs is a necessary party to this case. And I think you ought to decide that first and let's get that straightened out before we go on to the issues of summary judgment.

THE COURT: But why, why should I wait – because I still have you.

MR. MONE: Oh, there's no question you have us.

THE COURT: Yes. And I mean that respectfully, you are subject to the personal –

MR. MONE: And I, and I meant it respectfully, too.

THE COURT: Right. You're subject to the personal jurisdiction of this Court. So, I ought to face up to these issues, have my say about these issues, and then we'll see where we are. I don't see any reason not to do that. It's, it's just delay otherwise.

And you agree with that, Mr. Barshak? You're here to deal with all issues before the Court.

MR. BARSHAK: I certainly am.

THE COURT: Fine.

[16] MR. BARSHAK: May I just add, there's no motion for summary judgment by Scruggs, it's a motion to dismiss.

THE COURT: Well, it's in the alternative for summary judgment. He raises in the alternative.

MR. BARSHAK: But –

THE COURT: But it is a motion to dismiss.

Now, that being so, I'm going to now hear Mr. Mone on the issue of, the Ness firm's motion for summary judgment. And then we'll see where we are.

Mr. Mone.

MR. MONE: Yes, your Honor. We've moved for summary judgment on two bases. One is the so-called Castano release and the other is on the ethical rule on, that this was not a fee split arrangement that was agreed to by any client.

On the Castano release to begin. The Castano – Castano was a partnership of lawyers in Louisiana containing lawyers from all over the country for the purpose of bringing a class action tobacco case in, for a nationwide class. A nationwide class was certified, it was thereafter decertified, and ultimately they broke off and brought individual state actions.

THE COURT: He's never signed any release.

MR. MONE: Wait a minute.

THE COURT: Mr. Daynard.

[17] MR. MONE: He, he hasn't – he still is a member of the Castano committee. He never disavowed

the release to us while we were, while it was being negotiated. And the release itself says, by Wendell Gauthier, who signed it, that they had the authority to bind those members of the PLC, the Plaintiffs Litigation Committee, of which Mr. Daynard was and still is a member. And so under those circumstances, particularly given his silence to us, who were negotiating the release, who were relying on the release. And the release is clear, it is a matter of law for this Court to construe that release, that release is in very broad form, that it releases all of the claims of the Castano litigation committee against Ness, Motley, and, incidentally, against Mr. Scruggs and it couldn't be clearer that that's a release that binds Professor Daynard in this oral $100 million contract.

And that release ought to be given effect particularly given not only did Professor Daynard sign it, which in our view is ratification of the release, but particularly since he still insists he's a member of the committee and therefore still seeks to get benefits out of his membership from the committee, and if he's getting the benefits he ought to also get the burden. And the burden is that this claim was released.

THE COURT: But how, admitting the force of that, [18] how can I adjudicate that on summary judgment against Mr. Daynard's affidavit which addresses it directly.

MR. MONE: Well, he does not, he does not claim that he was not a member of the committee. He does not claim, he does not claim that –

THE COURT: He says –

MR. MONE: – that is not a valid signature that occurred, that is on that release.

THE COURT: But before this he says I never authorized Mr. Gauthier to release my individual claim against the defendants for which the present suit is brought.

Now, doesn't that create a genuine issue?

MR. MONE: I don't think so in these circumstances where you have, where you have Gauthier's certification that he was releasing it, where you have Daynard aware that the release contained that certification, and given the fact that he never disavowed the release until after we raised it in the context of this litigation.

So, no, I don't think that Professor Daynard's affidavit changes the circumstances at all. He was and is a member of the committee. The committee released this claim. As they released the claims – and these were real claims that went back and forth between Ness, Motley and the Castano committee. So there was definite consideration [19] passing back and forth.

So under those circumstances I say that this matter has been released, and it is a matter for summary judgment and it is a matter for the Court to construe the nature and extent of that release and we say that's clear.

I want to mention –

THE COURT: The second string to your bow is?

MR. MONE: And I want to mention briefly, which we have briefed fully, the issue of the failure under, under the law of Illinois where this agreement was, allegedly took place, certainly under the law of Massachusetts where Professor Daynard is, Professor Daynard is,

and I believe, I think he's a member of the bar in New York, I'm not exactly clear, but that provides very clearly that in order to have a division of fees the client has to be informed of the division of fees.

THE COURT: No, there is – there are serious issues.

MR. MONE: And this is therefore a void contract.

THE COURT: Well, serious issues I said. I have grave doubts whether Illinois law applies. But let's hear Mr. Barshak.

Mr. Barshak, on the two points here.

MR. BARSHAK: Yes, and I'll go in reverse order, if I may, your Honor.

[20] The last point which is raised –

THE COURT: Yes, what law do you think applies?

MR. BARSHAK: Well, it's a fascinating issue of conflicts of law which nobody has really explored here. That is, unlike what my brother says, this is not an Illinois contract. This was a contract entered into in Massachusetts. It wasn't initially a shared fee arrangement at all. It was a consulting arrangement initially as, as is set forth in the affidavit your Honor has before you. The payments were made on an hourly basis, then it changed as time went by. Forty odd different states are involved. I don't think any lawyer standing where I am could say it's more than a guess as to how you resolve the conflicts here. But I think –

THE COURT: It's a little more serious than that. We're talking, in this second point it has been raised, and once you raise this the Court must take it very seriously, it has been raised that you folks have acted unethically. You – not you.

MR. BARSHAK: I understand.

THE COURT: But your lawyer clients have acted unethically.

MR. BARSHAK: Yes. Let me address that very clearly.

THE COURT: His lead, his lead gun there is that [21] you're under the laws of Illinois, and if you are believed on the facts, the Ness firm, the Scruggs firm, and Mr. Daynard, acted contrary to their obligations as attorneys and in so acting they have entered into a contract which the Court must declare as void as against public policy.

I have some real interest what the clients think of this. I think you're playing with fire here on both sides. The release is one thing. Courts can fool around with that. Not fool around. But I have to address that.

But this business about challenging the ethical obligations of the attorneys hurts you all it seems to me. And yet, as Mr. Barshak says, it creates a truly fascinating question of conflicts of law.

I'll hear you, Mr. Barshak. Go ahead. Forgive the interruption.

MR. BARSHAK: I want, I want to address directly your Honor's statement that there's been unethical conduct here, because I think it is not so.

The ethical rule we all have in mind, even though it varies in its exact language from state to state, is one which is against fee sharing, particularly in contingent fee cases. It all comes from the old referral system. Even though Massachusetts, as your Honor knows, has been more liberal than other states, I say under none of these [22] rules has there been unethical conduct because the facts are as follows.

Mr. Daynard never became an attorney for any of the client states involved here. The attorneys for them were the two law firms who entered appearances and handled those cases. Mr. Daynard is someone who consulted with them as an outside lawyer. And as time went by they agreed that they would pay him not just on the hourly basis but a certain percentage really as, at that stage, which is 1996, and all this began in 1993, really as a statement as to what's fair compensation for him.

There, there are many decisions, some of which are cited in the briefs that your Honor has, which strongly show that the rule we're talking about, with respect to the ethics of lawyers not sharing fees with others, is one which does not cover the situation which I've just described to your Honor.

And I would just note – let me read just the first part of the Massachusetts rule, which is one version of it. It says: A division of fees is a single billing to a client covering the fee of two or more lawyers who are not in the same firm.

There is no single billing involved here for which Mr. Daynard says, hey, I'm an unstated share partner. Because as your Honor knows from the material before you, [23] the fees here that are involved, the portion that he says he's entitled to be paid for because of his contribution, are fees that have been determined by an arbitration panel which meets throughout the country, apparently, several times, which sets, to determine the fee coming to law firms from, not to the clients they represented, but from the tobacco industry defendants.

THE COURT: What happens, what happens if the clients here, and we're talking about a substantial sum of money, what happens if the clients can properly challenge this allocation of fees? Then do they get a refund?

MR. BARSHAK: I meant to go on because it's in what's before your Honor. Not only is it set up that the fees, arbitration fees that come from the tobacco industry, but we quoted in the affidavits language which specifically says as part of the master settlement agreement, which set up the arbitration, that that has nothing to do with clients and what the clients may pay.

This is not a case in which Professor Daynard is seeking five cents from any fee that's going to paid by any client. We don't seek it. We don't allege it. It is not what's before the Court.

THE COURT: And is it your position, therefore, that the disciplinary – suppose you were under Illinois law. You say that these, even if under Illinois law in the [24] unique circumstances of this cigarette litigation there's no, the general public policy of Illinois does not apply.

Is that what you say?

MR. BARSHAK: That's for one, yes, for one reason which I've given you. But there are other reasons, too. And that is – I'll take Rhode Island, for example. I just happen to –

THE COURT: But no one says Rhode Island law applies.

MR. BARSHAK: No, but I just want to call something to your Honor's attention as an example of how the ethical rule we're talking about is something that is administered with real thought as to what's the purpose of the rule.

The purpose of the rule certainly is not to reach a situation where someone like Professor Daynard as an outside consultant to a firm, never really represents them. And I had this printed in large print for myself, your Honor. But if you don't mind I will give it to the Court.

It's an ethics opinion recently, 1997, in Rhode Island which, in which the ethics group, I guess it's, I don't know if it's the Court or a bar association, said that, you know, the rule really doesn't apply if the lawyer who was not a party, who was not, was not otherwise entitled to a shared fee, if you take the rule literally, [25] was a judge who had, was a lawyer who had become a judge and therefore got out of the case.

THE COURT: Respectfully, what –

MR. BARSHAK: There are loads of cases which – I – there are California cases going both ways.

THE COURT: Well, as complex as this is, I have Illinois, I have Mississippi, I have South Carolina, I have New York and I have Massachusetts, arguably whose laws and/or disciplinary rules for attorneys apply. How can conceivably it help me to know what Rhode Island has done in some general information opinion? What difference does it make?

MR. BARSHAK: Well, the difference is this, if your Honor please.

We're here on a motion to dismiss or summary judgment, whichever your Honor pleases. What you have before you, I submit, in terms of proffered evidence factually is a situation which I contend does not come within the intendment of the rule whether it's the rule as stated in New York or anyplace else. One reason it does not come within it is that we're not talking about clients' fees. Another reason why it doesn't apply is we're not talking about a lawyer who actually was representing the clients involved. He was consulting.

THE COURT: In other words, we're not talking [26] about true attorneys' fees because this is a common fund case in its, in its unique configuration.

MR. BARSHAK: That's another way to put it.

THE COURT: All right.

MR. BARSHAK: And there's another factor which I just want to mention briefly because I don't want to use up your Honor's time.

If there was any responsibility here to get consent of clients, it was the responsibility of the two law firms –

THE COURT: Oh, believe me, that has not, that has not eluded me.

MR. BARSHAK: – not of Mr. Daynard. And it's very odd that they are here raising this issue particularly since –

THE COURT: Well, I have that in mind. So since –

MR. DARSHAK: Okay.

THE COURT: – I'm not, I really don't think that Illinois law applies, I think I should give Mr. Mone the last word.

Mr. Mone, on this argument, put the release to one side for a moment and assume for the moment that Illinois law does not apply, it being entirely fortuitous that the contract, if there was one, was entered into in Illinois. [27] I mean, this is just a classic factual circumstance. I need not use the word smoke-filled room, but it has nothing to do with Illinois.

So assume it does not. What should I do if it's not Illinois?

MR. MONE: Well, you could look, you could look at Massachusetts. Look at New York where Professor Daynard is licensed to practice. Look at South Carolina where the Motley firm is licensed to practice. Or you could look at Mississippi where the Scruggs firm is licensed to practice.

THE COURT: I could do any of those. What, what should I do?

MR. MONE: You would get the same result no matter where you go. The ethical rule is essentially the same. And I would, and I also would like to just say one thing to the Court. It's very difficult for these law firms to have informed their clients about an agreement that they had, that they didn't know about, disavowed, and to say today that it doesn't exist. So, Professor Daynard is a lawyer. In at least the Florida case where he seeks to get, where he seeks to get fees, he was acting as a lawyer down there.

So, you know, this is – he's a lawyer. And he's bound by these ethical rules. And we're bound by them, too. And we're willing to be bound by them.

[28] THE COURT: All right, thank you. Here's the order of the Court. Because it's only a partial order, and I'll start where the argument started.

The Court, on the issue of personal jurisdiction over Scruggs and the Scruggs firm, finds that the Court does not have personal jurisdiction over Scruggs and the Scruggs firm. And the reason is that while the facts are sufficient to show a joint venture with respect to the Mississippi litigation, as the First Circuit has defined the term substantial influence in the Donatelli versus National Hockey League case, there is insufficient evidence in this case that the Mississippi law firm or Mr. Scruggs exercised a substantial influence over the Ness firm such as would subject Scruggs or the Mississippi firm to personal jurisdiction in Massachusetts.

I don't have a motion before me to transfer the case. In any event, I'm not going to consider such a motion until I've addressed issues under the summary judgment aspect brought by the Ness firm.

But I will enter the order dismissing Scruggs and the Mississippi firm immediately, so that you may appeal, Mr. Barshak, I'll write an opinion supporting my conclusion there, but I've stated my reasoning. That's the bottom line of my reasoning.

On the, on the motion for summary judgment, on the [29] two grounds of the motion for summary judgment, and let me be clear. First, on the ground of the release, I simply see that there's a genuine issue of material fact in the light of Mr. Daynard's affidavit so I cannot enter summary judgment.

On the issue of the alleged violation of the disciplinary rules of various states such that I ought as matter of public policy of those states grant summary judgment to the Ness firm, I'm going to take that under advisement. And I'm going to say very clearly I do not, and perhaps I overspoke, and I sometimes do, I do not accuse anyone of violating any ethical rules.

On the record before the Court, I am not in a position, nor do I, nor would it be provident to accuse any of the attorneys before the Court, the clients, obviously not the attorneys who are acting as counsel in this case, but any of the attorney parties of falling below their ethical obligations to any of the states in which they practice.

Nevertheless, as Mr. Barshak has properly said, this is a most knotty problem. And so, I, I do want – well, first of all, I'm able to say that the law of Illinois does not control. I so rule. The law of Illinois does not control. It being utterly fortuitous that the agreement, if there was an agreement, and I'll assume that [30] there was for purpose of summary judgment only, took place in Illinois.

I do want and I do direct the parties to give notice of this litigation to include Mr. Daynard's complaint to their various clients. It doesn't have to be characterized. You can settle a form of notice. And I want that done within 30 days. And the clients, I will hear the clients if they have any interests here. I don't know that they do. But if they have any interests. And then 60 days thereafter I want briefs on the following points.

First, assuming that Illinois law does not apply, what law governs the alleged fee agreement? Second, which disciplinary authorities have jurisdiction over the lawyers involved in the alleged fee agreement. And there's a subset of that question: With respect to each lawyer involved in the alleged fee agreement which disciplinary authority has jurisdiction. And third, how should the alleged disciplinary violations by the plaintiff affect the validity of the alleged fee agreement. By the defendants, same question, by the defendants. Are there alleged violations by the defendants.

So, the short of it is, as to the business of the breach of contract and declaratory judgment, Counts I and II, I am taking that under advisement subject to the order [31] just entered. Summary judgment is denied under Count III, breach of the implied covenant of good faith. There's no adequate argument that there was such a breach.

Count IV is taken under advisement for the same reasons already said.

Quantum meruit is denied. Summary judgment, because Daynard may claim that quantum meruit theory.

Same for VI, it's denied.

The motion for summary judgment under Count VII is allowed. The alleged misrepresentation of authority by Mr.

Scruggs is barred by the three year statute of limitations in Massachusetts.

The violation of Chapter 93A is denied for the moment. It has not been adequately briefed. But I have grave doubts whether to support recover [sic] under 93A. The primary effect has to be here in Massachusetts under that, what is it, Clinton Hospital, Corson v. Clinton Hospital. It seems to me this may be a contract, if there even is a contract, that's primarily outside of Massachusetts.

That's the Court's order. Thank you very much.

MR. MONE: Thank you, your Honor.

(Whereupon the matter concluded.)

[32] UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

I, Donald E. Womack, do hereby certify that the above proceedings were reported by me stenographically and this transcript represents a true and accurate transcription of said proceedings.

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